(15,925)

Supreme Court of the United States.

October Term, 1895. No. 636.

The Penn Mutual Life Insurance Company *et al.*, [redacted] Appellants

vs.

City of Austin *et al.*, [redacted]

Appeal from [redacted] THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

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IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIFTH CIRCUIT AND WESTERN DISTRICT OF TEXAS, AT AUSTIN.

The Penn Mutual Life Insurance Company et al., *Complainants*,

vs.

The City of Austin, et al., *Respondents*.

In Equity.
No. 207.

IN THE SUPREME COURT OF THE UNITED STATES, AT WASHINGTON, D. C.

The Penn Mutual Life Insurance Company et al., *Appellants*,

vs.

The City of Austin et al., *Appellees*.

Transcript demanded by C. W. Ogden, Solicitor for Appellant, and delivered April 10th, 1895.

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CAPTION.

BE IT REMEMBERED, that there was opened and begun to be holden a regular term of the United States Circuit Court, for Fifth Circuit and Western District of Texas, at the City of Austin in said Circuit and District, on the 4th day of February, A. D. 1895, it being the first Monday in February and

the day fixed by law for commencing a regular term of said Court at said place; and on March 8th, A. D. 1895, the following officers being present:—

Honorable A. P. McCormick, one of the Circuit Judges of the United States for the Fifth Circuit; Honorable Robert U. Culberson, United States District Attorney; Richard C. Ware, United States Marshal, and D. H. Hart, Clerk, the following among other proceedings were had, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT AUSTIN.

The Penn Mutual Life Insurance Company, Jacob Tome, Robert Goelet and Ogden Goelet, Complainants,	
vs.	
The City of Austin, John McDonald, Mayor of the City of Austin, William C. Walsh, Frank Hamilton, S. K. Morley, A. P. Wooldridge, John W. Maddox, M. A. Taylor and John McDonald, composing the Board of Public Works of the City of Austin; and the Austin Water, Light and Power Company, Defendants.	In Equity. No. 207.

1 COMPLAINANTS ORIGINAL BILL.

Filed January 3rd, 1895.

TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, FIFTH JUDICIAL CIRCUIT, SITTING IN EQUITY:

The Penn Mutual Life Insurance Company, a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen and resident of the said State of Pennsylvania, Jacob Tome, a citizen and resident of the State of

Maryland, and Robert Goelet and Ogden Goelet, both citizens and residents of the State of New York, present this their bill of complaint for themselves and on behalf of others similarly situated who may desire to come into this suit and pay their proportion of the costs hereof as against the City of Austin, a municipal corporation, incorporated by that name and by virtue of the laws of the State of Texas, the territory whereof is situated in the County of Travis and State of Texas, and against John McDonald, Mayor of said City of Austin, and against Wm. C. Walsh, Frank Hamilton, S. K. Morley, A. P. Wooldridge, John W. Maddox, M. A. Taylor and John McDonald, the said John McDonald and the six other defendants last above named constitute the Board of Public Works of the said City of Austin and are all residents and citizens of the County of Travis and State of Texas; and against the Austin Water, Light & Power Company, a corporation organized and existing under the laws of the State of Texas, and being a resident and citizen of the County of Travis in the State of Texas. And thereupon, humbly complaining, your orators show unto your Honors:

First.—That your orator, the Penn Mutual Life Insurance Company, is a corporation duly organized and existing under the laws of the State of Pennsylvania; that your orator Jacob Tome, is a citizen and resident of the State of Maryland, and that your orators Robert and Ogden Goelet each are citizens and residents of the State of New York. The defendant, the City of Austin is a municipal corporation, organized and existing under the laws of the State of Texas, and John McDonald of the County of Travis and State of Texas, is the Mayor and chief executive officer of the said City of Austin; and the defendant, the Austin Water,
2 Light and Power Company, is a corporation duly organized and existing under the laws of the State of Texas, and Joseph Nalle of the County of Travis and State of Texas, is the President thereof.

Second.—That the defendant herein named, John McDonald, Mayor of the City of Austin, and Wm. C. Walsh, Frank

Hamilton, S. K. Morley, A. P. Wooldridge, John W. Maddox and M. A. Taylor, constitute the Board of Public Works of the City of Austin and were appointed and elected as such by the City Council of the City of Austin, the powers and duties of which said Board of Public Works are defined in an ordinance passed by the City Council of the City of Austin, entitled "An ordinance to amend and to condense into one ordinance an ordinance entitled an ordinance to create a Board of Public Works of the City of Austin, and to prescribe the powers and duties thereof," and amendments thereto passed by the said City Council on October 6th, 1890, and approved October 8th, 1890, by John McDonald, Mayor, a certified copy of which said ordinance is herewith filed, marked "Exhibit A," and prayed to be taken and considered as a part of this bill.

Third.—That by an act duly enacted by the legislature of the State of Texas, entitled "An Act to incorporate the City of Austin," approved April 5th, 1873, (which is contained in the official publication of the laws of Texas, and a duly certified copy of which will be produced, if required, at the hearing of this cause, and which it is prayed will be taken as a part of this bill), it was, among other things provided and enacted by Article 6, Section 7, that the Mayor and City Council of Austin should have power "To construct water works, gas works, within or beyond the city limits, or both; to provide the City with water and gas and to erect hydrants, fire plugs and pumps in the streets; to erect the necessary machinery, lamps, posts, etc., for lighting the city within or beyond the limits of the City for the convenience of the inhabitants of the City and environs," and under section 10 of the said article, "To provide for the lighting of the streets and erecting lamps thereon."

And by section 20 of the same article, "To provide for the prevention and extinguishment of fires and organizing and establishing fire companies."

3 And by Article 7, Section 1, "To make all ordinances which shall be necessary and proper for carrying into effect the powers specified in the preceding section."

Fourth.—That on and prior to the 13th day of April, 1882, the City Water Company, a corporation organized and existing under the laws of the State of Texas, for the purpose of furnishing water to the City of Austin and the inhabitants thereof, owned and operated a water works plant in the City of Austin, and had so owned and operated the same for many years prior to the 13th day of April, 1882.

Fifth.—That on and prior to the 13th day of April, 1882, it was provided by the general laws of the State of Texas, as follows: "The municipal authorities of any city, town or village in which any gas-light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, alleys, lots, squares and public places in any such city, town or village."

Sixth.—That on and prior to the said 13th day of April, 1882, the population of the City of Austin had increased to more than 10,000 people and the then existing facilities for furnishing water to the inhabitants, and the necessary protection from fire, were deemed by the Mayor and City Council of the said City of Austin insufficient to meet the requirements and necessities of the constantly increasing demands of the city and the inhabitants thereof.

Seventh.—That the said Mayor and City Council of the said City of Austin deemed it necessary to provide for a more effective protection of the property of the taxpayers of the City of Austin from fire, and of extending such protection to a larger number of taxpayers and to secure to the inhabitants of the said city a supply of water suitable for domestic purposes.

Eighth.—That for the purpose of supplying the necessities of the City of Austin, as above stated, the investment of a large sum of money was required, at a time when the credit of the city would have rendered it difficult, if not impossible, to have procured the same, and at a time when the making of

a loan sufficiently large for the purposes named, which, if made at all, could only have been made at a very high rate of interest, and would have so nearly exhausted the taxing power of the City, and so heavily burdened the property of the taxpayers of the city that it would have seriously impaired the ability of the city to carry on other needed public works and public improvements.

Ninth.—That on the said 13th day of April, 1882, the best, if not the only means by which the said city of Austin could exercise the power and duty imposed upon it of supplying the said city and the inhabitants thereof with an adequate and wholesome supply of water for domestic purposes, and insuring the property of the taxpayers of the said city adequate fire protection, was by inducing some private individual or corporation to supply the necessary capital for the purpose of constructing the water works then demanded by the necessities of the city.

Tenth.—That no corporation or individual would have been willing to incur the heavy expense and risk involved in the construction of a system of water works, without some assurance that the cost would be repaid, or that, for a reasonable time at least, the investment would yield a certain income.

Eleventh.—That in the exercise of the powers and authority granted to the Mayor and City Council of the said City of Austin by its charter as aforesaid, and for the purpose of supplying the said city as aforesaid and the inhabitants thereof with water, and provide a more effective protection to the property of the tax payers from fire, the said Mayor and City Council of the City of Austin did, by an ordinance passed on the 13th day of April, 1882, authorize and instruct the Mayor of the said City of Austin to contract with the said City Water Company for the construction, for the said City of Austin, a system of water works, adequate to meet the necessities of the said City and the inhabitants thereof, and that the said Mayor of the City of Austin made

and entered into said contract with the said City Water Co., under and by virtue of and in accordance with the said ordinance, a certified copy of which said ordinance and contract, duly executed by the said Mayor and by M. D. Mather, president of the City Water Co., acting on behalf and under the direction and authority of their respective corporations, is herewith filed marked "Exhibit B" and prayed to be taken and considered as a part of this bill.

Twelfth.—That the citizens and tax payers of the said City of Austin, realizing the necessities of the City and the inhabitants thereof and the inability of the City to supply the demands of the inhabitants in that regard, petitioned the City Council of the City of Austin to enter into the said contract with the City Water Co., and that the said petition to that effect was numerously signed by the tax payers and citizens of the said City of Austin, a copy of which said petition is herewith filed, marked "Exhibit C" and prayed to be taken and considered as a part of this bill.

Thirteenth.—That as a preamble to the said ordinance, it was recited by the said Mayor and City Council that the said ordinance was passed and the said ordinance was entered into because "The City Council of the City of Austin deem it necessary to provide for more effective protection of the property of tax payers of the said City from fire, and for the purpose of extending such protection to a large number of tax payers, and also to secure to the citizens of the said City a supply of water suitable for domestic purposes and for the further benefits to the City of Austin hereinafter mentioned, and in accordance with the 7th and 12th sections or paragraphs of article 6, of the charter of the City of Austin, together with the other powers contained in said article 6."

Fourteenth.—That by the terms of said contract between the City of Austin and the City Water Co., there was given and granted to the City Water Company, the right and privilege for a term of twenty years from the date of the execution

of this contract, of supplying the city of Austin and the citizens thereof with water by a system of water works constructed upon the method of supplying a city with water, either for domestic use or for the extinguishment of fire.

"That said Water Co. was further authorized to construct and operate water works in said City; to lay pipes and mains through all the streets, alleys and public grounds; to erect and maintain all engines and machinery necessary for supplying the City with water for domestic, fire, manufacturing and other purposes. In consideration of the privileges granted to said Water Co., it was required to construct works of not less capacity than three millions of gallons in twenty-four hours. The pumps required to be of the kind manufactured by the Holly Co., and of the character described in the ordinance. The company was required by the ordinance to lay many miles of mains and pipes,
6 with hydrants at points to be designated by the City Council, and at all times to maintain a supply of water sufficient for all needs of the city, and especially was it required so to construct its works as to be able to supply from pressure of its own pumps through the mains and pipes, water for the extinguishment of fires, and maintain that pressure as long as should be necessary for the extinguishment.

That the prices to be paid to the Water Co. for supplying water to the city and to its citizens, were set out in said ordinance, the City stipulating that in part consideration for the water so to be furnished, the property of the Water Co. should be exempt from municipal taxation during the running of the contract.

Fifteenth.—That it was further stipulated and agreed under said contract that the City of Austin should have the right to acquire by purchase and become the sole owner of the water works, including all grounds, machinery, mains, pipes, buildings and property at the expiration of ten years, or at any time thereafter, upon giving one year's notice of such intention, upon paying therefor to the owners thereof the value of said property, to be ascertained by appraisal in the manner

provided in said contract. And in case the city should not purchase and become the owner of said works and property at the expiration of twenty years, then all the rights and privileges in this contract granted to said City Water Co. should be extended to said company, its successors and assigns, for a further period of twenty years thereafter, subject to all the duties, liabilities, obligations and penalties therein provided for; provided, that if at the time of such purchase by the City, said works and franchises shall be encumbered by mortgage, the City shall assume and pay such liability as part of the appraised value of said property.

And it is further provided in said contract that so much of the hydrant rental to be paid by the City of Austin under the contract as will fully pay the interest on all outstanding bonds of the City Water Co., and all bonds that may hereafter be issued by it, shall be paid to the holders of such bonds through their trustee, at the times specified for the payment of such hydrant rental to said company, so long and until all such bonds are fully paid and cancelled, and the balance of said rental shall be paid to said company.

7 The City of Austin further stipulated to make all ordinances and appropriations necessary to secure the City Water Co, in the rights and privileges granted in said agreement, as long as the same shall be in force, and that both parties to this contract may be represented by officers, agents, assigns or successors.

Sixteenth.—That the capital of said company was wholly inadequate for the extensive works and improvements that were required by said City for the comfort and protection of its citizens, but it was believed that with the security offered by said contract *to* company would be able to obtain the money required, by the issue of bonds, secured by mortgage upon its property. That this plan of raising the money was well understood and agreed to by the Mayor and City Council of Austin, and in furtherance thereof, it was provided in this contract that the water rental to become due from the City should be paid to the trustee under the mortgage given to

secure such bonds, and that in case of the City's exercising its option to purchase the water works, it should assume the payment of the bonds to be issued by the said Water Co. That inasmuch as by the said contract, the said city bound itself either to buy the said works at not less than their actual value or to grant to said company, its successors and assigns, a renewal for another term of twenty years of all the rights and privileges by said contract granted, which included "The right and privilege of supplying the City of Austin and the citizens thereof with water" at the same rate specified in said contract, it was considered that such bonds would be well secured, and could readily be negotiated.

Seventeenth.—That the Water Co., to secure the money needed for the construction of its works, and in pursuance of the plan contemplated in said contract, did, on the 1st day of July, 1882, issue $250,000.00 of first mortgage 7% gold bonds, and secured the same by a mortgage to the Farmer's Loan & Trust Co. of New York, upon its entire property located in the City of Austin, including its buildings, engines, pumps, mains and pipes, and all its apparatus and machinery connected therewith, and all the property which the said company might thereafter acquire.

That the said mortgage expressly provided that the rentals to become due from the City of Austin, under contract with said company, should be set aside to pay the interest
8 on said bonds as by the terms of the ordinance and contract, the city had agreed might be done.

That the whole issue of said bonds was sold, and the proceeds applied either to the payment for the property already acquired by said Water Company, or to defraying the cost of erecting the engines, buildings, pumps, mains and pipes aforesaid.

And your orator, the Penn Mutual Life Insurance Company, did, in good faith and for a valuable consideration, to wit: the sum of $102,500 in cash, purchase of said mortgage bonds the amount of $100,000 face value; and that your said orator purchased said bonds without any notice whatso-

ever of any alleged invalidity in the contract between the said City of Austin and the said Water Co. and with full faith in the binding obligation of said contract, and in full faith and confidence in fact that said contract between the City of Austin and the Water Company would be faithfully observed and carried out by the said City of Austin.

Eighteenth.—That upon the execution of said contract, the City Water Company at once proceeded to erect a large, expensive apparatus upon the banks of the Colorado river, in the City of Austin, and to operate the same with powerful steam engines of such strength and capacity as were required by the said contract, and were sufficient to force the water throughout the City, and connected therewith many miles of water mains and pipes running through the various streets and alleys of the said city, and supplying water at the points and in the quantities required by the city authorities, and the said works were approved and accepted by the said city by an ordinance passed by the said City Council of the City of Austin on the 5th day of March, 1883, a copy of which said acceptance and approval is herewith filed marked "Exhibit D" and prayed to be taken and considered as a part of this bill.

Nineteenth.—That as the said Water Company was required from time to time to extend and enlarge its works for the comfort and better protection of the said City, it became necessary to raise an additional sum of money, and it thereupon made an additional issue of $100,000.00 of second mortgage to the said Farmers Loan & Trust Company of New York, upon all of its property covered by the first mortgage aforesaid, and the addition thereto, which mortgage was duly executed and recorded in the same manner as the first mortgage, and a copy of the same duly certified will be produced at the hearing of this cause, if required. That all of said bonds were sold and the proceeds applied to the construction and extension of said water works. That your orator, Jacob Tome, did in good faith and for a valuable consideration, to-wit:

the sum of $10,000 in cash, purchase of said mortgage bonds the amount of $10,000 face value; and that your said orator purchased said bonds without any notice whatsoever of any alleged invalidity in the contract, and in full faith and confidence in the fact that said contract between the City of Austin and the Water Company would be faithfully observed and carried out by the said City of Austin.

Twentieth.—That by an ordinance of the Mayor and City Council of Austin, passed January 7th, 1884, M. D. Mather and his associates were granted the right to erect poles in the streets and alleys of the City of Austin, for the purpose of suspending wires and maintaining a system of electric lights.

That said Austin Electric Light Co., for the purpose of erecting the necessary plant and machinery, executed a mortgage to the American Loan & Trust Co. of New York, upon all of its property, to secure an issue of $25,000 6% gold bonds, all of which bonds were sold and the proceeds applied as aforesaid.

Twenty-first.—That on the 28th day of June, 1887, all the rights and interest of the City Water Company of Austin, to the property which it has acquired in said City, including its lands, buildings, engines, pumps, mains, pipes and hydrants, and its rights, franchises and rentals under the contract with the City of Austin above referred to were transferred and assigned to the Austin Water, Light & Power Company, a corporation duly incorporated under the laws of the State of Texas, for the purpose of furnishing water and electric light and power to the City of Austin, and on the 28th day of June, 1887, all the property and franchises of the Austin Electric Light Company were in the same manner conveyed and assigned to the said company, whereby the said Austin Water, Light & Power Co. became seized and possessed of all the property of both the aforesaid companies, subject only to the mortgage debts already secured upon them, and became entitled by the terms thereof to all the rights and privileges of said companies, and especially to the

right to furnish water to the City of Austin and its inhabitants upon the terms set out in the ordinance and contract of 13th of April, 1882, between the City of Austin and the said City Water Co. and its successors and assigns, duly certified copies of all of said deeds as herewith filed and prayed to be taken as part of this bill, marked " Exhibits E & F."

Twenty-second.—That with the growth of the City of Austin it became necessary to make large additions to the machinery and equipment of the said Water Company, and to supply the increased demand for water in the new sections of the city, a large amount of new pipes had to be laid, and to procure the money required for this purpose and to comply with the demands made upon it by the city authorities under the terms and stipulations of the contract aforesaid, the said Austin Water, Light and Power Company executed a consolidated mortgage to the Farmers Loan & Trust Co. of New York, to secure the issue of $750,000 six per cent. gold bonds, upon all real estate, buildings, machinery, engines, reservoirs, pumps, pipes, dynamos, boilers, lamps, wires, poles and property of every kind, and especially did it convey to the trustee for the benefit of those who might become the owners of said bonds, all the rights, powers and privileges and franchises granted and conferred under the ordinances and contracts with the city of Austin, and all the net income, rents, profits and emoluments, and especially that which should become due from the City of Austin.

By the terms of said mortgage $375,000 of the bonds to be issued were reserved and set aside for the redemption or exchange of the previous issues of bonds by the two companies of which said Austin Water, Light and Power Company was the successor and assignee. And the remaining $375,000 of said consolidated bonds were sold or hypothecated to raise the money required for the enlargement and extension of said works.

Your orators, Ogden and Robert Goelet did in good faith and for a valuable consideration, to-wit: the sum of $50,000 in cash, purchase of said consolidated bonds the amount of

$50,000 face value, and your orators purchased said consolidated bonds without any notice whatsoever of any alleged invalidity in the contract between the said City of Austin and the said Water Company, and with full faith in the binding obligation of said contract, and in full faith and confi-
11 dence in the fact that said contract between the said City of Austin and the Water Company would be faithfully observed and carried out by the said City of Austin.

Twenty-third.—That since the 1st day of July, 1887, the said Austin Water, Light and Power Company has carried out in good faith all its contracts and undertakings with the City of Austin and has expended large sums of money in making additions to its works and in laying mains and pipes in those streets required by the citizens or designated by the City Council. That the Mayor and City Council have always recognized it as the successor of the City Water Company, and as such bound to carry out its undertakings, and entitled to its rights and privileges.

That from time to time the said City, under the rights reserved in the said contract, has required the said Austin Water, Light & Power Co. to extend its water mains and pipes (and also its appliances for electric lighting) over and through portions of city where the public necessity or convenience was thought to require, but where the private consumers were so few that the only source of revenue was from the hydrant rentals (and the rates for lights) which the said City had contracted to pay, and the said company has always made such extensions solely for the purpose of complying with its said contract, although believing that eventually these portions of the City would be built up, and that then the value of its plant and the security of its bondholders would in a corresponding measure be increased. That the additions so ordered by the said city and constructed by the said Water Co. have all been accepted and made use of by the said city; and on the thirteenth day of May, 1888, the said city acting under the authority of an ordinance passed on the 20th day of February in the same year, contracted with the said company for the erection and

maintenance for a period of five years, of twenty-five arc lights and one hundred incandescent lights, for which the said city agreed to pay the sum of six thousand, two hundred and fifty dollars ($6250.00) per annum. That all of said lights were erected and have been supplied by the said Co. in the manner and upon the terms set forth in the last mentioned contract, which still remains in full force and effect.

12 *Twenty-fourth.*—That the said system of water works constructed as hereinbefore alleged by the said City Water Co. and the said Austin Water, Light and Power Co. is an efficient and approved system of water works, capable of furnishing the City of Austin and the inhabitants thereof now and for many years to come, all the water required for their utmost needs, and of furnishing sufficient and abundant fire protection to all parts of the City where the said mains have been laid and the fire hydrants erected by the said Water companies under the direction of the said City, and that the said Austin Water, Light and Power Co. is abundantly able, through its said system of water works, to furnish all the water required by the said city, and the inhabitants thereof an efficient and effective protection from fire to all the property on any extension which may be reasonably required by the said City for many years, and that the said system of water works is of the reasonable value of Six Hundred and Fifty Thousand Dollars; there has been expended in the construction and maintenance thereof, a much larger sum, to-wit: about the sum of eleven hundred and fifty thousand dollars, but that a large proportion of the capital so invested in the construction and maintenance of the said system of water works has been lost by reason of the constantly growing necessity of taking up old pipes and mains and laying new ones in stead thereof, in order to comply with the repeated requirements of the said City of Austin, and in order to meet the requirements and demands of the said City and the inhabitants thereof, and to preserve and maintain the said system of water works in such condition as will insure to the said City of Austin and the inhabitants thereof an adequate and sufficient supply of water for all purposes.

Twenty-fifth.—That as inducement for the sale of the mortgage bonds hereinbefore mentioned executed by the said Water Co., the said bonds were offered for sale with a statement of all the facts hereinbefore recited, to-wit: that the said works had been constructed under the aforesaid contract, at the request of and for the benefit of the said City; that the sum so stipulated to be paid by the said city for hydrant rentals then amounted to many thousands of dollars per annum, and that the said City had agreed to pay the said sum to the trustee under the said mortgage, to be applied to the payment of interest on said bonds, and that the proceeds of said bonds were to be applied to the payment of the cost of construction and extension of said works which had been so ordered by the said city, and that under the terms of the said contract the said city would either purchase the said works or continue to pay the hydrant rentals for a period much longer than that provided for the running of said bonds, and in the case of its exercising the right of purchasing the said works under the power reserved in the said contract, it would pay for the same their full value as determined by arbitration, and assume payment of said bonds as part of said appraised value.

Twenty-sixth.—That your orators purchased the bonds owned by them as hereinbefore alleged upon the faith in their behalf in the truth of the statements made as hereinbefore alleged, as inducements for the purchase of said bonds and were so purchased in good faith, believing that the value of said works, taken in connection with the contract aforesaid, was abundant security for the said bonds which the said water company then proposed to issue, and that the said Water Co. was fully performing its part of said contract and that the said service was being accepted by the said city, and the annual payments provided for in said contract were being regularly made by the said city to the said Water Co., and that the said contract had been and was being fully performed in good faith by the said Water Co.

Twenty-seventh.—That all of these representations were made by the said Water Co. with the full knowledge and consent and approval of the said authorities of the City of Austin. And it is well known to the City of Austin and its present officers that the said bonds were purchased on the faith of these representations and that in this way the money was raised to pay for the cost of constructing the said works and extending the same as the said city has, from time to time, required; and that thus, the large sum of money contributed by the said bond holders has all been expended for the benefit of the said City of Austin, and at its request, and is now invested in property in the said City, the value of which depends almost entirely upon the said contract.

Twenty-eighth.—That by means of the said contract the said city has, for many years, enjoyed, at prices fixed by itself, an abundant supply of water for needs of its citizens and
14 an efficient means of protecting the property within the city from fire, and that these benefits and advantages have been furnished by the expenditure of money supplied by the said owners and holders of the said bonds purchased on the faith of the said contract. That any breach, on the part of the city, of its said contract or any violations of the terms thereof, in respect to the payment of water rentals, or of the interest on said bonds, and any interruption on the part of the city, or any interference with the rights of the water company by the said city or any one acting under its authority, whereby the right of supplying water to the city of Austin and the inhabitants thereof should be terminated or interfered with, except in the manner provided in said contract, would be a violation of the solemn obligations of the said contract, and destructive of the rights of the said company and of the holders of the bonds issued thereby.

Twenty-ninth.—Your orators further represent that on the 31st day of March, 1890, the said Council of the City of Austin passed an ordinance entitled "An ordinance ordering an election to obtain the consent of the property tax paying

qualified voters of the City of Austin to an extension by the City Council of the bonded indebtedness of the city of Austin for the purposes of constructing a system of water works and furnishing lights for the City of Austin" by which said ordinance it was provided that an election should be held in the City of Austin on the 5th day of May, 1890, for the purpose of obtaining the consent of two thirds of the qualified voters of the City of Austin who paid taxes on property in the said city to the extension of the bonded debt of the said city, in the sum of one million four hundred thousand dollars beyond the existing debt of $125,000.00, for the purpose of erecting a system of water works and the furnishing lights for the city and the inhabitants thereof, which ordinance was approved by the Mayor of the City of Austin on the 1st day of April, 1890. A copy of said ordinance marked "Exhibit G" is herewith filed and prayed to be taken and considered as a part of this bill. And that thereafter, to-wit: on the 5th day of May, 1890, an election was held as provided in the ordinance referred to, and whereby the tax payers of the said City of Austin gave their consent to the extension of the bonded indebtedness of the said city as in the said ordinance provided, and that thereafter, to-wit: on May 5th, 1890, the said City Council of the said City of Austin, further legislating upon the said subject passed an ordinance whereby the said City Council of the City of Austin declared and ordained that more than two-thirds of the qualified voters of the City of Austin who pay taxes on property and having property in said city, having voted in favor of the extension of the bonded indebtedness of the said city in the sum of $1,400,000.00 for the purpose of constructing a system of water works and to furnish lights to the said city and the citizens thereof, that therefore the power to extend the said bonded indebtedness of the city beyond the sum of $125,000.00 had been duly conferred upon the City Council in the manner provided by law, which said ordinance was approved by the Mayor of said city on the 6th day of May, 1890, a copy of said ordinance is herewith filed and prayed to be taken and considered as a part of this bill, the same

being marked "Exhibit H." That thereafter to-wit: on the 21st day of July, 1890, the City Council of the City of Austin, further legislating upon the said subject, passed and adopted an ordinance entitled "An ordinance to provide for the issuance and sale of bonds of the City of Austin to the amount of $1,400,000.00 for the purpose of erecting a system of water works and furnishing light by and to the city of Austin, and to regulate the disbursement of their proceeds," which said ordinance was fully approved by the Mayor of the City of Austin on the 23rd day of July, 1890, a copy of which ordinance marked Exhibit I is herewith filed and prayed to be taken and considered as a part of this bill. That thereafter, to-wit: on the 6th day of October, 1890, the said City Council of the said City of Austin, further legislating upon his subject, passed and accepted an ordinance entitled "An ordinance to amend and condense into one ordinance an ordinance entitled an ordinance to create a board of public works of the City of Austin, and to prescribe the powers and duties thereof," which said ordinance was duly approved by the Mayor of the City of Austin on October 8th, 1890, whereby the said City Council did by said ordinance provide that the said board of public works as it was then organized, should, subject to the approval of the City Council, continue the construction of a system of water works for the City of Austin and a system of lighting the said city with electricity,
16 by means of a dam across the Colorado river at a point selected by J. P. Frizell, civil engineer, a copy of which said ordinance is herewith filed marked Exhibit J., and prayed to be taken and considered as a part of this bill.

Thirtieth.—That the purpose and intent and effect of the said ordinances passed as alleged in the foregoing article hereof by the said City Council of the City of Austin and approved as aforesaid by the Mayor of the said city, and the purpose and intent and effect of all acts done and performed by the defendants herein, under and by virtue of the said ordinance, was to impair and destroy the binding force and

obligation of the said contracts hereinbefore alleged to have been executed and entered into between the said City of Austin and the said City Water Company and the Austin Water, Light and Power Company, and that the said ordinances were passed and adopted by the said City Council of the said City of Austin and approved by the said Mayor of the City of Austin in violation of the provisions and inhibitions contained in section 10 of Article 1 of the Constitution of the United States.

Thirty-first.—Your orators would further represent that in the unlawful and inequitable manner hereinbefore alleged, the said City of Austin, acting through its said Mayor and City Council and Board of Public Works, proposes, intends and has threatened to construct the said system of water works as hereinbefore alleged, and for the purpose of providing for the interest and sinking fund on the bonds of the said City of Austin, issued for said purpose, the said City of Austin has levied a tax upon all of the property in the said City of Austin, including the property belonging to the said Austin Water, Light and Power Co., and that in the year, 1893, the said City of Austin valued the property of the Austin Water, Light and Power Co. for the purposes of taxes at $258,250.00, and levied a tax thereon of $5,276.80, and for the year 1894 the said City of Austin has valued the property of the Austin Water, Light and Power Co. at the sum of $256,650.00 and will levy a tax thereon of more than $5,000.00, the exact amount of which your orators cannot now state, and that a large proportion of the said tax levied for the said years 1893 and 1894 upon the property of the said Austin Water, Light and Power Co. was for the purpose of paying the interest and sinking fund on said bonds issued by the City of Austin for the unlawful purposes above stated; and that the said City of Austin intends and proposes and threatens to levy upon
17 the property of the said Austin Water, Light and Power Co. a tax for the said purpose, each and every year, and that the said tax which it has threatened to levy for the purposes aforesaid upon the said property of the Austin

Water, Light and Power Co. will largely exceed the sum of $5,000.00. And your orators would further show that your orators are informed and believe, and they allege and charge that the said Austin Water, Light and Power Co. proposes and intends to pay the said tax as above stated, whereby the said City of Austin is, in the manner above stated, levying a tax upon the property which stands as security for the bonds which your orators own, and that the said Austin Water, Light and Power Co. proposes and intends to pay said tax, which said tax is to be expended by the said City of Austin in destroying the value of said property which stands as security for the said bonds, for the proposed construction as hereinbefore alleged, of a rival system of water works.

Thirty-second.—Your orators would further represent, that on or about the 3rd day of April, 1891, the Legislature of the State of Texas passed an act entitled "An Act to incorporate the City of Austin, to grant it a new charter, and to extend its boundaries" and in section 46 of the said act of the Legislature of the State of Texas, the said Legislature of the State of Texas authorized and empowered the said City of Austin to erect, construct, build and operate a water and electric light system to supply the City and its inhabitants with water and electric lights by constructing and maintaining a reservoir of water in and about the channel of the Colorado river within and without the City limits, by erecting a dam across the same where such dam was then being constructed to serve as a reservoir and to furnish power to operate the said electric light and water works system, and to build such other reservoirs as may be necessary at such an elevated point within or without the limits of the city as may be necessary to supply the higher portions of the city with water; a copy of which said act marked Exhibit K is herewith filed, and prayed to be taken and considered as a part hereof.

Thirty-third.—That the purpose, intent and effect of the said act of the legislature of the State of Texas was to impair the

binding force and obligation of the said contracts hereinbefore alleged to have been executed and entered into between
18 the said City of Austin and the said City Water Co. and the said Austin Water, Light and Power Co., and that the said legislation was unlawful and in violation of the provisions and inhibitions contained in section 10 of article 1 of the Constitution of the United States.

Thirty-fourth.—That notwithstanding all the matters and things hereinbefore alleged, the said City of Austin, by and through its Mayor and Council, have proclaimed their purpose of repudiating the contract heretofore made by the said city with the said Water Co., and have undertaken in the unlawful manner hereinbefore alleged to provide for a supply of water for the said city without purchasing the water works of the said company as stipulated in the said contract, or intending to thus depreciate and destroy the value of the property of the said Water Co. in the hope of purchasing the same for a small sum.

Thirty-fifth.—That the water works plant of the said Austin Water, Light and Power Co. is now supplied with the latest and most improved machinery and devices for the purposes of distributing water throughout the city and furnishing abundant and efficient protection from fire, and that the rival system of water works now proposed to be constructed by the City of Austin, is in no particular or respect an improvement upon the said system of water works of the Austin Water, Light and Power Co. and it is not pretended that the same is intended to be constructed for the purpose of securing improved methods or improved machinery or improved devices, and it is contemplated by the said City of Austin to take the water from the Colorado river, the same source from which the said Austin Water, Light and Power Co. take the water distributed by it throughout the city, and it is proposed to prepare and purify the same for use in the same manner that the said water is prepared and purified by the Austin Water, Light and Power Co., viz.: by filtering into chambers prepared for that purpose, and that the said new system of water works so proposed to be constructed by the City of

Austin is not, in any particular or respect, an improvement upon the said system of the Austin Water, Light and Power Co.

Thirty-sixth.—That as soon as the said City of Austin announced its intention of constructing a rival system of water works, and before anything was done in pursuance
19 thereof, the said M. D. Mathers, president of the Austin Water, Light and Power Co., on behalf of the said Water Co. and these bondholders, remonstrated with the said Mayor and City Council and requested them and urged them not to violate the said contract or to take any steps to depreciate the value of the property of the said Water Co., but to exercise the right which the said city has, to purchase the said works at their appraised value ; and the said bond holders have continued, ever since that time, to remonstrate with the said City of Austin and the officers thereof, but that the said city has entirely disregarded the said remonstrances and requests and has openly repudiated all liability under the said contract, and has already expended a large sum of money in the construction of a dam across the Colorado river, and the said Board of Public Works, composed of the said defendants as aforesaid, as such, are now openly declaring their intention to construct a rival system of water works, and to that end are taking contracts with various persons to furnish material for or to perform work upon the construction of the said rival system of water works, and are now actually laying water pipe in and along the streets of the City of Austin ; and it is the declared and avowed intention of the said City to press the construction of said rival system of water works to a speedy completion, and upon the completion of the same, to discontinue the taking of water from the said Water Co. and to refuse to perform any of the obligations resting upon the said city as embraced in the said contract with the said City Water Co.

Thirty-seventh.—That the water pipes and mains of the said Austin Water, Light and Power Co. are now laid on, along and through the principal streets of the City of Austin, and

the said City of Austin and the said Board of Public Works are now threatening to lay the pipes and mains of the said rival system of water works on, along and through the same streets which are now occupied by the pipes and mains of the said Austin Water, Light and Power Company.

Thirty-eighth.—That neither the City of Austin nor the inhabitants thereof have any necessity for two systems of water works and cannot support the same, and that it would be impossible for the said Austin Water, Light and Power Company to supply water to the inhabitants of the said City, if the city repudiates its portion of the said contract, and the value of the entire property of the Austin Water, Light and Power Co. which was so constructed at great expense for the benefit of the said City, and at its request and upon the faith of its obligations will be practically destroyed, and irreparable loss and injury will be inflicted upon the said Austin Water, Light and Power Co. and its bond holders.

That all the revenues received from all sources by the said Water Companies, except that received from the City of Austin as rental from the said hydrants, which had been applied to the payment of interest on the said bonds, and has been expended in the repair, improvement and betterment of the said water works, and for extending the mains and pipes thereof.

Thirty-ninth.—That your orators are informed and therefore charge that the officers of the said City of Austin sometimes pretend, as an excuse for the unlawful acts hereinbefore alleged, that it was beyond the power of its former Mayor and City Council to make the said contract with the City Water Co. to supply the said city with water for a period of twenty years and that the said contract with the City Water Co. was and is *Ultra vires* and therefore void, but your orators are advised that the said city had full power and right to build or buy water works, and the City Council and Mayor thereof were fully authorized to make a contract binding upon the city for either of the purposes of water supply or lighting, and as the contract aforesaid is in the alternative binding the

city to take the water at the rates therein named or to purchase the works at their fair value, and in as much as the said Water Co. has fully complied with and performed all the obligations resting upon it under the said contract, your orators submit that the said city should not be permitted, in equity and good conscience, to deny the authority of the said Mayor and City Council to make the said contract with the said Water Co. until the City of Austin has re-imbursed the Austin Water, Light and Power Company and its bond holders to the extent of the value of the said water works, to be ascertained in the manner provided in the said contract, or in such other manner as may be directed by this Honorable Court for the large sums of money which have been expended by the said City Water Co. and the Austin Water, Light and Power Co. and the bond holders thereof, for the benefit and at
21 the request of the City of Austin and on the faith of the contract hereinbefore set forth.

Fortieth.—That your orators and the other bond holders of the said Water Co. have repeatedly applied to the said Austin Water, Light and Power Co. and its president and Board of Directors, and requested them to institute proceedings to protect the property of the said Water Co. and the rights therein of the said bond holders, but that the said Water Co. has failed to comply with the request of your orators and said bond holders. But the said Austin Water, Light and Power Co. and the officers thereof, by reason of the contract relations existing between the said City of Austin and the said company fear that the consequences of any such litigation instituted by said Water Co. would be exceedingly disastrous, and would precipitate adverse and hostile action by the said City of Austin.

Forty-first.—Your orators further show that this is a cause in equity, of a civil nature, and that the amount in dispute, exclusive of interest and costs, exceeds the sum or value of $5,000.00 and that in this cause there is a controversy between citizens of different states, in which the amount exceeds exclusive of interest and costs, the sum or value aforesaid.

Forty-second.—And now your orators further show unto your Honors, that ever since the making of the said contract between the said city and the said Water Co. and up to the time when, as aforesaid, the said city announced its intention of repudiating the same, the said city has, at frequent intervals, enacted ordinances affirming and declaring the validity of the said contract and the right of the said city to require the said Water Co. and its successors to comply with all the provisions thereof in favor of the said city. That, as hereinbefore stated, the requirements of the said ordinance have been exceedingly burdensome to the said Co., but the said Co. and its successors have always admitted the right of the said city to insist upon the observance of the said contract and have in good faith complied with all its demands and requirements thereunder, and in such compliance, and often without the least prospect of any immediate return to itself, has incurred great expense in enlarging and extending its mains, the means for which were supplied by the bondholders upon the faith of the said contract, and from which the
22 said city did derive and ever since has enjoyed a full benefit and advantage. And yet, notwithstanding all this, the said city is now threatening, as your orators have shown unto your Honors, to build a new system of water works, to destroy the value of the said Water Co.'s property, to repudiate its obligations under the said contract, to confiscate the property of the said Water Co. and in utter disregard of its own duty and of the rights of your orator and other bondholders, to render valueless and destroy their security. All of which acts and doings are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orators.

Forty-third.—And your orators further show that they have frequently and in a friendly manner applied to the said City of Austin and to the Mayor and City Councils thereof, and to the Board of Public Works of said City, and requested them to desist and refrain from all their said proceedings, and your orators well hoped that they would have complied with such reasonable request of your orators, as in equity and good con-

science they ought to have done, but now so it is, may it please your Honors, that the said City of Austin and the said Mayor and City Councils thereof, and the said Board of Public Works, contriving how to injure and aggrieve your orators in the premises, refuse to comply with reasonable request of your orators, in consideration whereof, and for as much as your orators are remediless in the premises by the strict rules of the common law and can have adequate relief only in a Court of equity where matters of this kind are properly cognizable and relievable.

To the end therefore that the said defendants may show, if they can, why your orators herein should not have the relief herein prayed for, and make full, true, direct and perfect answer to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were here again repeated and they were thereunto interrogated, and that your orators may have the decree of your Honorable Court, adjudging and decreeing that the said ordinance and contract, so accepted and acted upon by all the parties, are in full force and effect and that the said contract is a valid and subsisting contract, binding upon the said city as well as upon the said Water Co. and upon the said bond holders, and that the said city must abide by and perform the same, and that until its pur-
23 chase of the said existing Water works, in the manner and upon the terms set forth in the said contract, and that the said City of Austin, its Mayor and City Council and Board of Public Works have no right or power to construct a river water works system to, in any way, interfere with the rights of the said Austin Water, Light and Power Company and that it is unlawful and inequitable for the said City of Austin to levy and collect the tax upon the property of the said Austin Water, Light and Power Co. to be expended in the unlawful and inequitable manner hereinbefore alleged, in the construction of a rival system of water works; and that a writ of injunction may issue out of this Honorable Court restraining the said City of Austin, its Mayor and City Council and Board of Public Works and its other officers, servants, agents and employees from taking a supply of water from

any other source and from proceeding in constructing and maintaining a new and distinct system of water works, and from taking and appropriating to its own use, except in the manner provided in said contract, any portion of the said works, so constructed at its instance and for its benefit with money furnished upon the faith of its obligation by the said Austin Water, Light and Power Co. and the said bond holders, and that your orators may have such other and further relief as the case may, in equity, require and as to this Honorable Court may seem proper.

And may it please your Honors to grant unto your orators a writ or writs of subpœna to be issued out of and under the seal of this Honorable Court, directed to the said defendants, the City of Austin, John McDonald, Mayor of the City of Austin, and John McDonald, Wm. C. Walsh, Frank Hamilton, S. K. Morley, A. P. Woolridge, John W. Maddox and M. A. Taylor, composing the Board of Public Works of the City of Austin, commanding the said defendants and each of them to appear in this Honorable Court at some certain day therein named and to answer the premises but not under oath, answer under oath being expressly waived, and abide by and perform such decree as may be rendered herein.

THE PENN MUTUAL LIFE INS. CO.

EDW'D. M. NEEDLES,
President.

J. TOME,
ROBERT GOELET,
OGDEN GOELET,

By

ROBERT GOELET,
Atty.

SAMUEL B. HUEY,
CHAS. W. OGDEN,
24 PRESTLY K. EWING,
O. T. HOLT,
J. M. MCCORMICK,
WENDEL SPENCE,
Solicitors for Complainants.

UNITED STATES OF AMERICA,
STATE OF PENNSYLVANIA,
COUNTY AND CITY OF PHILADELPHIA, } *ss.*

Edward M. Needles being duly affirmed states that he is the President of the Penn Mutual Life Insurance Company, one of the Complainants in the foregoing bill, and that the facts therein stated are true, in so far as they are stated of his own knowledge, and so far as they are stated on information derived from others he believes them to be true.

EDW'D M. NEEDLES.

Affirmed to and subscribed before me this 18th day of December, A. D. 1894.

CURTIS PARSON,
Notary Public.

[SEAL]
PHILADELPHIA, PA.

UNITED STATES OF AMERICA,
STATE OF MARYLAND,
CITY OF BALTIMORE, } *ss.*

Jacob Tome being duly sworn says that he is one of the Complainants in the foregoing bill, and that the facts therein stated are true, in so far as they are stated of his own knowledge, and so far as they are stated on information derived from others he believes them to be true.

J. TOME.

Sworn to and subscribed before me, this 19th day of December, A. D. 1894.

HENRY R. DULANY,
Notary Public.

[SEAL]

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY AND CITY OF NEW YORK, } *ss.*

Robert Goelet being duly sworn says that he is one of the complainants in the foregoing bill, and that the facts therein stated are true, in so far as they are stated of his own knowledge, and so far as they are stated on information derived from others he believes them to be true.

ROBERT GOELET.

Sworn to and subscribed before me, this 21st day of December, A. D. 1894.

T. FRITH, JR.,
Notary Public for Kings Co.

Ctf. filed in N. Y. Co.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } *ss.*

Robert Goelet being duly sworn says that he is the attorney in fact for Ogden Goelet who is one of the Complainants in the foregoing bill, and that he executed the same as and for the act and deed of the said Ogden Goelet.

ROBERT GOELET.

Sworn to and subscribed before me this 21st day of Dec'r., A. D. 1894.

T. FRITH, JR.,
Notary Public Kings Co.

[SEAL]
Ctf. filed in N. Y. Co.

(*Endorsement.*) No. 207, Equity. Penn Mutual Life Ins. Co. *et al. vs.* The City of Austin *et al.* Complainants Original Bill. Filed Jan. 3rd, 1895, D. H. Hart, Clerk, By O. H. Millican, Deputy.

On consideration of the foregoing bill and exhibits, and the motion of complainants for a temporary injunction, it is

ordered that the respondents (after ten days notice) show cause before the Circuit Judges or before either of them at the audience room of the U. S. Circuit Court of Appeals, in New Orleans, Louisiana, at 11 A. M. on Thursday, 24 day of January, 1895, or as soon thereafter as counsel can be heard, why the temporary injunction prayed for should not be granted.

This Jany. 7, 1895.

A. P. McCORMICK,
Circuit Judge.

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26 EXHIBITS A AND J TO ORIGINAL BILL.

Filed January 3, 1895.

AN ORDINANCE.

To amend and to condense into one ordinance an ordinance entitled, "An ordinance to create a Board of Public Works of the City of Austin, and to prescribe the powers and duties thereof," and amendments thereto.

SECTION 1. Be it ordained by the City Council of the City of Austin, that a Board of Public Works for the City of Austin be and the same is hereby established, to consist of the Mayor of the City of Austin and the ten persons heretofore elected by the Council as member of the existing Board of Public Works who shall continue in office for the term of four years from the date of their election. In case of the death, resignation or refusal or inability to act of any member of said Board, the Council shall fill the vacancy caused thereby by election by ballot, and the person so elected shall continue in office during the unexpired term he was elected to fill; and the council shall every four years from the date of election of the members of the Board for the regular terms, proceed to elect ten persons, who together with the Mayor for the time being shall constitute the Board of Public Works.

SEC. 2. The said Board as now organized shall, subject to the approval of the City Council, continue the construction of a system of water works for the City of Austin, and a system of lighting the city by electricity, by means of building a dam

across the Colorado river at the point selected by J. P. Frizell, Civil Engineer, and such other reservoirs of water as may be necessary for said purposes, and shall provide for conducting water and electricity to and about the city to supply the city and the inhabitants thereof with said water and light.

SEC. 3. The bonds of the city heretofore by ordinance directed to be issued by the city to raise money to construct a water and light system for the City of Austin, shall be issued, signed and delivered in instalments by the Mayor on requisition by the Board of Public Works and direction of the City Council, as they may be needed from time to time as the work progresses; and said Board shall be the agents
27 of the city to sell said bonds subject to the approval of the City Council, in such quantities and at such times as they may deem best for the City; but no bonds shall be sold for less than par value at the time they may be sold, nor shall said bonds bear a greater rate of interest than five per cent. per annum, and no commission or fees shall be allowed any one for negotiating or selling said bonds.

SEC. 4. The money obtained for said bonds shall be placed in the City Treasury as a special fund and shall only be paid out on appropriations made by the council to pay expenses incurred by the Board of Public Works, authorized by the Council, itemized bills of which shall be approved by the Board of Public Works, and filed in the office of the City Clerk.

SEC. 5. The civil engineer and assistants employed by said Board as heretofore constituted shall continue as the agents and employes of the city until removed by lawful authority, and the contracts made with them by the Board of Public Works for the city are hereby ratified and in all things made the contracts of the city by and through the Board of Public Works, and said engineer, J. P. Frizell, or such other engineer, if any, as shall succeed him, should a vacancy occur in his position, shall be superintendent of said works under the control of said Board, and shall pass on all plans, specifications and bids as to the character of said works to be done and material to be used, and submit his recommendations to

the Board of Public Works, and shall personally attend and superintend said work under the direction and control of said Board who shall report their action to the City Council for its approval; and all contracts made for the construction of said works or any part thereof, shall be made in the name of the city by the Board of Public Works and signed by the Mayor, attested by the City Clerk and sealed with the corporate seal of the City of Austin, when approved by the City Council.

SEC 6. The present Secretary of said Board is hereby recognized as an employe of the City of Austin, to serve as Secretary of said Board on the terms agreed upon between him and said Board, and he shall continue to perform the duties of such position until removed by lawful authority. He shall keep accurate accounts in detail of all the transactions of said Board, to include the names of all persons employed
28 on said works, the amount paid to each one, the material purchased, the place of the purchase, the price paid for the same and the freight and other cost of carriage and hauling, which items shall be reported to the Council from time to time as the work progresses, for their approval, and as appropriations may be required from time to time to pay for the same.

SEC. 7. No class of convict labor shall be employed by said Board, or any contractor or sub-contractor with the city, to work on or about any part of the dam or the water and light system, or to work in quarrying, cutting or otherwise working on or about rock to be used in said work, or in making brick therefor, or in any work of excavating or filling which may be done in the prosecution of this work; and all contracts for any of the afore mentioned work shall contain a stipulation that a violation of the provisions of this section shall render such contract null and void at the instance of the city.

SEC. 8. Said Board shall serve without pay, and no member thereof shall be interested, directly or indirectly, in any contract for material or work to be placed on said dam, or in the profits arising from the same; but may be interested in a bid for the bonds of the city at or above par; but if a member of

the Board shall be interested, directly or indirectly, in a bid for said bonds, he shall make such facts known to the Board, and shall not be present or vote when bids for the bonds are being acted on by the Board.

SEC. 9. That an ordinance entitled "An ordinance to create a Board of Public Works of the City of Austin, and to prescribe the powers and duties thereof," approved April 3, 1890, and all ordinances amending the same, be and the same are hereby repealed, and that this ordinance take effect from and after its passage.

Passed October 6, 1890. Approved October 8, 1890.

JOHN McDONALD,
Mayor.

Attest:
MILTON MORRIS,
City Clerk.

(*Endorsement.*) An Ordinance to amend and to condense into one ordinance an ordinance entitled, "An ordinance to create a Board of Public Works of the City of Austin, and to prescribe the powers and duties thereof," and Amendments thereto. Exhibit A. Exhibit J. No. 207 Eq. Filed Jan. 3, 1895. D. H. Hart, Clerk, By O. H. Millican, Deputy.

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29 EXHIBITS B AND C TO ORIGINAL BILL.

Filed January 3, 1895.

CITY WATER COMPANY CONTRACT WITH THE CITY OF AUSTIN.

AN ORDINANCE.

Contract between the City Water Company and the City of Austin.

This contract made and entered into this thirtieth day of April, A. D. 1882, by and between the *City Water Company*, a corporation of the City of Austin in the County of Travis

and State of Texas, party of the first part, and the *City of Austin*, a body corporate of the County of Travis in the State of Texas, party of the second part, *Witnesseth:*

WHEREAS, the City Council of the City of Austin deem it necessary to provide for a more effective protection of the property of tax payers of the said city from fire; and for the further purposes of extending such protection to a larger number of tax payers, and also to secure to the citizens of the said city a supply of water suitable for domestic purposes, and for the further benefits to the City of Austin, hereinafter mentioned, and, in accordance with the seventh and twentieth sections or paragraphs, of article six (6) of the charter of the City of Austin, together with the other powers contained in said article six (6).

Therefore, Be it ordained by the City Council of the City of Austin:—

SECTION 1. That there is hereby given and granted to the City Water Company the right and privilege for the term of twenty years from the date of the execution of this contract, of supplying the City of Austin and the Citizens thereof with water by a system of water works constructed upon the method of supplying a city with water, either for domestic use or for the extinguishment of fire, that is to say: by pumping the water directly into the mains with contrivances by which the pressure on those mains may be increased or diminished, or preserved uniform.

SEC. 2. The said company is hereby authorized to establish, construct, maintain and operate said work in said City of Austin; to receive, take and store, construct and distribute water through the city; to construct and extend aqueducts, mains and pipes through all the streets, alleys, lanes and public grounds, across any stream or bridges in said City; to erect and maintain all engines, machinery and other appliances necessary for the proper conduction of said works, and for supplying said city and the inhabitants thereof with water for domestic, manufacturing, fire and other purposes.

The said City Water Company shall have the right to take

up all pavements or side-walks on streets, alleys, lanes or public grounds, and make such excavation therein as may be necessary to lay, repair and maintain aqueducts and pipes below the surface of the ground for conveying and distributing said water as aforesaid; *provided*, that said company shall, within a reasonable time, replace and repair all pavements and side-walks and fill all such excavations and restore the streets in as good condition as they were in before.

SECTION 3. The said company shall be liable for all damages occasioned by a failure to guard and protect persons and property from injury by reason of the removal of such pavements and side-walks, or the making of such excavations as aforesaid. The rights and liabilities provided for in this contract shall continue for a period of twenty years, unless sooner extinguished by purchase as hereinafter provided.

SECTION 4. The said water works shall be constructed with pumps of not less capacity than three million gallons in twenty four hours, and also to produce the fire streams hereinafter mentioned, the pumps shall be what is known as the quadruplex compound condensing pumping engines of the Holly Company, and there shall be in addition an auxiliary, or reserve high pressure pump of the same capacity, making an aggregate easy working capacity of five million gallons per day.

SECTION 5. The said City Water Company shall lay six miles of mains and pipes more or less, as shown on the plat which makes a part of this contract, and is marked exhibit "A," for the distribution of water in said city, in addition to the mains and pipes already in use. The mains and pipes used in this extension shall be of proper sizes, and the said City Water Company shall replace such of its mains now in use with such other mains and pipes as to secure, in
31 connection with the extensions herein mentioned, an easy flow of water through the entire system of mains, and to comply with all the conditions of this contract; said mains shall be from four inches to sixteen inches in their inner diameter, and shall be of a standard weight and strength to insure the fire streams hereinafter mentioned.

SECTION 6. The said City of Austin shall, by a vote of the City Council, have the right to take up any of the hydrants on the mains and pipes now in use, and re-locate them upon the extensions designated in section five, and the said City of Austin shall also order twenty five hydrants at the expense of the City Water Company, in addition to the number now in use, to be located upon said extensions, making in all one hundred hydrants upon the entire pipe distribution herein contemplated. The City of Austin hereby agrees to pay said City Water Company an annual rental of one hundred dollars for each of said one hundred hydrants, for the purposes contemplated in this contract, which said rental shall be payable semi-annually on the first of July and January of each year, in a warrant drawn on the City Treasurer, that is to say: at the end of each half year or six months, during the full time specified in this contract, the first payment for each of these hydrants to become due and payable at the end of six months after each of said hydrants is placed in position and ready for use; and, for the purpose of providing for the payment of all hydrant rental becoming due under the provisions of this contract, the City Council shall annually make an appropriation sufficient to pay the same out of the first moneys, not otherwise appropriated, arising from the general revenue of the city.

SECTION 7. For all extensions of mains which the city may hereafter order, in addition to the extension contemplated in this contract, the said company shall erect not less than ten (10) fire hydrants to the mile, for which the city shall pay a rental of fifty dollars a year for each hydrant so ordered and erected, payments to be made as hereinbefore mentioned.

SECTION 8. None of the hydrants from which fire streams are to be taken, as hereinafter provided, shall be located upon pipes or mains of less than four inches in their inner diameter. The said City Water Company shall permit any owner or occupant of any building to erect stand pipes and connect the same with the mains hereby authorized to be laid or any main hereafter laid by order of the council of the said city of Austin, under the provisions of this contract, and they shall have the use of water through such

32

stand pipes and connections for the prevention and extinguishment of fires, free of charge, upon giving the said City Water Company a written agreement that they will not use the water from said pipes and connections for any other purpose whatever.

The said City of Austin shall have the right to erect and connect twenty-five fire hydrants to the mains, at any time, under the provisions of this contract, at the expense of the said Water Company, and use the same for the prevention and extinguishment of fires, free of charge, provided always that the said City of Austin shall first pay a rental on the first one hundred (100) hydrants contemplated in this contract.

The City of Austin shall have the right to connect stand pipes to the mains of all extensions ordered by the city, after first paying a rental for at least ten (10) hydrants for every mile of such extensions. The owner or occupant of any property may also connect stand pipes or hydrants with the mains, upon the city paying the rental hereinbefore mentioned. As soon as the works are completed the said City Water Company shall cause the fire streams hereafter specified to be produced in the presence of the City Council, or such committee as the council may appoint, which test shall take place within five (5) days after the completion of said works. At the first meeting of the council, after the full and faithful performance of the tests hereinafter specified, the City Council shall accept the works and the date of such acceptance shall be the time at which the city shall commence to pay the rental for the hydrants at that time located.

SECTION 9. Said water works when constructed shall have the capacity of discharging six (6) fire streams at the same time, through one (1) inch nozzles, from any six (6) hydrants located upon pipes not less in size than four inches in their inner diameter, through fifty feet of two and one half inch hose, to a height of one hundred (100) feet, or to maintain its equivalent in pressure at the nozzle of said hydrants, so long as it may be necessary for the extinguishment of any fires. There shall be always sufficient pressure for all domestic demands.

33 SECTION 10. The City Water Company furthermore agrees to put new hydrants in the place of old ones so as to make the nozzle connections for hose uniform throughout the whole one hundred and twenty-five hydrants located and to be located on the mains and pipes, as shown on the plat accompanying this proposition.

SECTION 11. The city shall have the right to use the water free of charge from the hydrants for the purpose of flushing gutters and sewers, whenever the council shall deem it necessary for sanitary purposes, upon giving notice to the persons in charge of said water works; the city shall also have water free of charge for the fire department buildings, city hall, and offices occupied for city purposes, for all public schools of the city, for fifteen public watering places, for man and beast, and also for one fountain in each park and public ground, the jets of which shall not exceed in volume one-sixteenth (1-16) of an inch orifice, and not to run to exceed six hours a day for eight months in the year, and shall also have water free of charge for the uses and purposes of the City Cemetery; in consideration for all of which, the property of the City Water Company shall be, and the same is hereby exempted from municipal taxation during the full term for which this contract is executed.

SECTION 12. The water rates to consumers shall not exceed two (2) cents per barrel of forty (40) gallons each.

SECTION 13. The City of Austin shall have the right to acquire by purchase and become the sole owner of said water works, including all grounds, machinery, mains, pipes, buildings and property thereto appertaining, at the expiration of ten (10) years, or at any time thereafter, upon giving one years notice of such intention, upon paying therefor to the owners thereof the value of said property, to be ascertained by appraisal as follows, to-wit: Said city shall select one competent person, and the owners of the water works another, and the two (2) so selected shall select a third, or in case they cannot agree upon such third person, a third person shall be appointed by the Judge of the District Court of Travis County; and the three

men so determined upon shall appraise the value of said property, exclusive of franchise, at its then cash value, which appraisal shall be binding upon both parties as to the value thereof, and said city shall have the right to purchase
34 and become the absolute owner of said works and property at such appraised value, which value shall not be less than the actual value of the works at that time. In case the city does not purchase and become the owner of said works and property, as aforesaid, at the expiration of Twenty (20) years, then all the rights and privileges in this contract granted to said City Water Company shall be extended to said company, its successors and assigns, for a further term of twenty (20) years thereafter, subject to the right of the city to purchase as aforesaid, and subject to all the duties, liabilities, obligations and penalties herein provided for, *provided, however*, that if at the time of such purchase by the city, said works and franchises shall be incumbered by mortgage or otherwise, the said city shall assume and pay such liability as part of the appraised value as aforesaid made and ascertained.

SECTION 14. It is hereby agreed by and between the City Water Company and the City of Austin that so much of the hydrant rental to be paid by the City of Austin under the provisions of this contract, as will fully pay the interest on all outstanding bonds of the City Water Company, and all bonds that may hereafter be issued by the said City Water Company, shall be paid to the holders of such bonds, through their trustee at the time specified in this contract for the payment of such hydrant rental to said company, so long and until all such bonds are fully paid and cancelled, and the balance of the hydrant rental due from the city shall be paid to the said City Water Company. It being understood that the hydrant rental which the City of Austin agrees to pay to the said company for fire protection, or so much of said amount as shall be necessary to pay the interest on such bonds shall be set aside and paid to the trustee of such bonds, and by him used exclusively and only for the payment of interest upon such bonds when and so long as the same shall become due

and payable, but in no event shall the City of Austin pay to said trustee, for such interest, a sum greater than the amount agreed to be paid to the City Water Company.

SECTION 15. That the City of Austin agrees to prevent the use of water from said hydrant, by itself, citizens or corporations, except for the purposes specified in this contract. That the said city shall make all ordinances, appropriations, etc., necessary to secure the City Water Company in the rights and privileges granted in this agreement, so long as the same may be in force. That either or both the parties to this contract may be represented by officers, agents, assigns or successors, who may be legally authorized to act and represent them, severally or jointly, as authorized.

Now therefore, these presents witness, that the said party of the first part, for and in consideration of the rights, privileges and agreements herein specified, hereby covenants and agrees to and with the said party of the second part, by its president M. D. Mather, that it will faithfully keep and abide by the provisions of this contract, and will faithfully and fully discharge, perform, fulfill and carry out all the duties, obligations, powers and all other matters and things by it in said contract provided to be done and performed, and the said party of the second part on its part hereby covenants and agrees to and with the said party of the first part, that it will faithfully keep and abide by the provisions of this contract, and shall and will faithfully and fully discharge and perform, fulfill and carry out the matters and things of every kind whatsoever, by it in said contract provided to be done and performed.

SECTION 16. All previous contracts with the Water Company shall be void after the completion and acceptance of the water works as specified in this contract.

SECTION 17. That the Mayor of the City of Austin be and is hereby authorized and instructed, in behalf of the City of Austin, to sign a certain agreement made and entered into by and between the City Water Company of the City of Austin, through M. D. Mather, President of said City Water Company, and the City of Austin, on this the 13th day of April, A. D.

1882, and the Mayor of said City of Austin is hereby authorized, empowered and directed to carry out and enforce all the provisions contained in said agreement.

SECTION 18. That this ordinance take effect and be in force from and after its passage.

In witness whereof, we, M. D. Mather, President of said City Water Company, and W. A. Saylor, Mayor of the City of Austin, have hereunto signed our names, with official letter affixed, using in one case a scroll for seal, and in the
36 other the official seal of the said City of Austin.

Done at the City of Austin, Texas, on this the thirteenth day of April, A. D. 1882.

Passed April 11th, 1882.

Approved April 13th, 1882.

[SEAL]

W. A. SAYLOR,
Mayor.

M. D. MATHER,
Pres. City Water Company.

Attest:
T. L. PURNELL,
City Clerk.

THE STATE OF TEXAS, }
COUNTY OF TRAVIS. }

Before me, N. S. Walton, Notary Public of Travis County, Texas, on this day personally appeared M. D. Mather, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for all the purposes and considerations therein expressed as President of City Water Company.

Given under my hand and Notarial Seal, at Austin, Texas, this 25th day of April, 1882.

N. S. WALTON,
Notary Public, Travis Co., Texas.

THE STATE OF TEXAS, }
COUNTY OF TRAVIS. }

Before me, N. S. Walton, Notary Public of Travis County, Texas, on this day personally appeared W. A. Saylor, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for all the purposes and considerations therein expressed as Mayor of Austin City.

Given under may hand and Notarial Seal, at Austin, Texas, this 25th day of April, 1882.

N. S. WALTON,
Notary Public, Travis Co., Texas.

THE STATE OF TEXAS, }
COUNTY OF TRAVIS. }

I, Frank Brown, Clerk of the County Court within and for the County and State aforesaid, do hereby certify that
37 the within and foregoing instrument of writing with its certificates of authentication, was filed for registration in my office on the 25th day of April, A. D. 1882, at 3:30 o'clock P. M. and duly recorded the 26th day of April, A. D. 1882, at 10:30 o'clock A. M. in the records of said County, in book 52, pages 278 to 285 inclusive.

Given under my hand and seal of office, this 26th day of April, A. D. 1882.

FRANK BROWN,
Clerk, Co. Court, Travis Co., Texas.

[SEAL]

By
THOS. F. NEILL,
Deputy.

We, the special committee and members of the city council, to whom was referred the ordinance and contract with the City Water Company, hereby certify that we have compared the contract executed in duplicate, with the ordinance and contract as passed by the City Council, April 11, 1882, and approved this 13th day of April, 1882, and find the same correct copies of the ordinance and contract as passed; and that

both copies are in accordance with the meaning and intent of the agreement of the City Water Company.

R. PLATT,
Chairman.
WM. BRUEGGERHOFF,
N. B. METZ,
H. B. KINNEY.

EXHIBIT C.

PETITION.

TO THE HONORABLE CITY COUNCIL OF THE CITY OF AUSTIN, TEXAS:

We, the undersigned residents and tax payers of Austin, respectfully request that you contract with the City Water Company for the construction and adoption of the Holly system, and such extensions as contemplated in the above proposition so as to give the City of Austin a better and more extended fire protection without the aid or assistance of steam fire engines:

Kreisle & Co.	Geo. Levyson & Phillipson,	T. L. Meyer,
38 Walter Tips,	John Bremond,	Alonzo Robinson,
Wayland & Criser,	Wm. Bissell,	John H. Robinson,
D. T. Iglehart,	State National Bank,	A. H. Robinson,
J. M. Keller,	DeLashmutt Bros.,	John Stelfox,
J. W. Graham,	Burke & Johns,	M. Maas,
S. R. Fisher,	W. A. Morris,	C. S. West,
A. P. Wooldridge,	J. W. Driskill,	Bandy & Parker,
R. E. Grant,	W. J. Matthews,	R. H. Smith,
L. E. Edwards,	Smith & Brady,	H. Hirshfeld,
Wm. Steel,	A. Van Patten,	J. W. McLaughlin,
J. W. Lawrence,	John Nagle,	R. M. Swearengen,
E. Krohn estate, per Wm. Brueggerhoff, Trustee,	Thos. Leech, Jr.,	M. Salm,
	DeCordova & Son,	R. B. Underhill,

F. W. James,
C. Myer,
L. W. French,
J. W. Hannig,
R. Bertram,
R. K. Smoot,
R. J. Swancoat,
B. Melasky,
H. C. Williams,
Geo. O. Evans,
J. H. Robinson,
Geo. W. Sampson,
F. Everett,
Paul Pressler,
Herman Schmidt,
Jas. H. Raymond & Co.,
C. F. Bissell,
W. B. Brush,
Newman & Co.,
Lewis Hancock,
Claud D. Johns,
Copes & Bass,
J. H. Bell,
39 Geo. W. Brush,
John Condon,
F. Frischmyer,
F. W. Turner,
Crow, McKean & Co.,
A. K. Hawkes,
E. F. A. Martin,

Chas. Boones,
Oscar Sweat,
A. Bahn,
John C. Lewis,
Elivin Perry,
Jas. A. Nagle,
C. F. Millett,
F. D. Wooten,
J. J. Tobin,
S. Simon,
A. W. Rundell,
A. P. Sprinkle,
R. C. Stewart,
A. Goodman,
John H. Robinson, Jr.,
J. T. Brackenridge,
R. J. Brackenridge,
E. M. Pease,
W. A. Pitts,
John W. Robertson,
E. C. Bartholomew,
T. B. Lee,
Jas. Martin & Son,
Monroe Miller,
G. E. Routh,
Wilson Gregg,
P. W. Jobe,
W. A. Walker,
Joel Pearl,

C. A. Dahlich,
Max Paul,
John Doehler,
Richard W. Bertram,
Joseph Goodman,
S. Loomis,
C. M. Bush,
Clay Jones,
B. C. Wells,
W. C. Wells,
W. J. Burk,
Z. T. Fulmore,
N. G. Shelley,
Frank Brown,
M. Davis,
F. R. Jones,
Padgitt & Warmoth,
W. E. Carpenter,
W. H. Firebaugh,
Andrew Neil,
J. M. Bennett,
F. Gridenweis,
Chas. Hofheintz,
G. Warren,
A. Dohme,
W. Ziller,
C. F. Rumpel,
M. M. Long,
Neil McCashin,
Eugene Bremond.

(*Endorsement.*)—"Exhibits B and C." No. 207 Equity. Filed Jan. 3rd, 1895, D. H. Hart, Clerk, By O. H. Millican, Deputy.

EXHIBIT "D," TO BILL OF COMPLAINT.

Filed Jan. 3, 1895.

EXHIBIT D.

WHEREAS, on the 13th day of April, 1882, the City of Austin entered into a contract with the City Water Company, in accordance with an ordinance passed April eleventh, 1882, and approved April thirteenth, 1882, providing for a more effective protection of the property of tax payers of the said city from fire, and for other purposes as specified in said contract. And whereas, the City Water Company has constructed a system of water works and now has the same in successful operation, in accordance with the provisions of said contract, and has fulfilled and complied with each and all of the provisions of said contract to the entire satisfaction of the Mayor and the City Council. Now therefore,

Resolved, that said water works be and the same are hereby accepted, and the said contract is hereby declared to be in full force and effect in all its provisions from this date henceforth, and the hydrant rental to be paid by the City of Austin to the City Water Company under the provisions of said contract, shall commence from and after this the six (6) day of March, 1883.

MAYOR'S OFFICE, Austin, Mch. 8th, 1883.

I hereby certify that the above and foregoing resolution was passed by the City Council of the City of Austin on the sixth (6) of March, 1883.

W. A. SAYLOR,
Mayor.

Attest:
T. L. PURNELL,
[SEAL] *City Clerk.*

(*Endorsement.*)—Acceptance of the contract with the City of Austin. March 6th, 1883. Exhibit D. No. 207 Eq. Filed Jan. 3, 1895. D. H. Hart, Clerk, By O. H. Millican, Deputy.

EXHIBIT "E 1" TO ORIGINAL BILL.

Filed Jan. 3, 1895.

THE STATE OF TEXAS, }
COUNTY OF TRAVIS. }

KNOW ALL MEN BY THESE PRESENTS, that the City Water Company of the County of Travis and State of Texas, in consideration of the sum of Two Hundred and Fifty ($250.00) Dollars, cash in hand paid by the Austin Water, Light and Power Company of the County of Travis and State of Texas, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed and released, and by these presents do grant, bargain, sell, convey and release unto the said Austin Water, Light and Power Company and their assigns, the following described property, to-wit: Lots Nos. one (1) five (5) six (6) seven (7) and eight (8) in block 186 as the same is designated on the map of the City of Austin, together with all and singular the rights, members, improvements, hereditaments and appurtenances to the same belonging or in any wise incident or appertaining.

To have and to hold all and singular, the premises above mentioned, unto the said Austin Water, Light and Power Company, heirs and assigns forever: and we do hereby bind ourselves, our heirs, executors and administrators to warrant and for ever defend all and singular the said premises unto the said Austin Water, Light and Power Company and their assigns, against every person whomsoever lawfully claim-
41 ing or to claim the same or any part thereof.

Witness our hand at Austin, Texas, this 28th day of June, 1887.

Signed, sealed and delivered in presence of.

THE CITY WATER COMPANY, [SEAL]
M. D. MATHER,
President. [SEAL]

Attest:

D. LACY B. WICKES,
Secretary City Water Company.

(*Endorsement.*) Exhibit E 1.—No. 207. Filed Jan. 3, 1895, D. H. Hart, Clerk, By O. H. Millican, Deputy.

EXHIBIT "E 2" TO ORIGINAL BILL.

Filed Jan. 3, 1895.

THE STATE OF TEXAS, }
COUNTY OF TRAVIS, }

KNOW ALL MEN BY THESE PRESENTS, that the City Water Company, of the County of Travis and State of Texas, in consideration of the sum of Fifteen Hundred ($1500.00) Dollars cash in hand paid by the Austin Water, Light and Power Company of the County of Travis and State of Texas, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed and released, and by these presents do grant, bargain, sell, convey and release unto the said Austin Water, Light and Power Company, its successors and assigns, the following described property, to-wit:

Lots No. one (1) two (2) three (3) and four (4) in block No. one hundred and eighty seven (187) in the City of Austin, County of Travis and State of Texas, fronting each sixty nine feet on Live Oak Street and running back same width one hundred and twenty-eight (128) feet to an alley and comprising the S. ½ of said block No. one hundred and eighty seven; subject to all rights, conditions and reserves mentioned in the deed made to the granter herein by N. G. Shelley and Geo. B. Zimpleman, dated August 28th, 1882, and recorded in the records of the County Clerk of said County and State in Volume 53 on pages Nos. 186, 187, 188, to which reference is made for the details. Together with all and
42 singular the rights, members, improvements, hereditaments and appurtenances to the same belonging or in any wise incident or appertaining.

To have and to hold, all and singular the premises above mentioned, unto the said Austin Water, Light and Power Company, its successors and assigns forever; and we do hereby bind ourselves, heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said Austin Water, Light and Power Company, its

successors and assigns, against every person whomsoever, lawfully claiming or to claim the same or any part thereof.

Witness our hand at Austin, Texas, this 28th day of June, 1887.

Signed, sealed and delivered in the presence of:

THE CITY WATER COMPANY, [SEAL]
M. D. MATHER,
President. [SEAL]

Attest:
D. LACY B. WICKES,
Sec'y City Water Company.

I, D. Lacy B. Wickes, Secretary and Treasurer of Austin Water, Light and Power Company hereby certify that the above and foregoing instrument is a true and correct copy of the original now in my possession.

D. LACY B. WICKES,
Secretary & Treasurer.

(*Endorsement.*) Exhibit E 2.—No. 207 Eq.—Filed Jan. 3, 1895. D. H. Hart, Clerk, By O. H. Millican, Deputy.

EXHIBIT "E 3" TO ORIGINAL BILL.

Filed Jan. 3, 1895.

THE STATE OF TEXAS,
COUNTY OF TRAVIS,

KNOW ALL MEN BY THESE PRESENTS, that the City Water Company of the County of Travis and State of Texas, in consideration of the sum of One Thousand ($1,000) Dollars cash in hand paid by the Austin Water, Light and Power Company, of the County of Travis and State of Texas, the receipt of which is hereby acknowledged, have granted, bar-
43 gained, sold, conveyed and released, and by these presents do grant, bargain, sell, convey and release

unto the said Austin Water, Light and Power Company and their assigns, the following described property, to-wit:

Lot No. five (5) in "Alm Hill," a sub-division of out lot No. 44 in division "B" of out lots adjoining the City of Austin, Travis County, Texas, containing one acre of land as shown by the plat of said sub-division recorded in book "Z" on page of the deed records of Travis County, Texas, together with all and singular the rights, members, improvements, hereditaments and appurtenances to the same belonging or in any wise incident or appertaining.

To have and to hold all and singular the premises above mentioned, unto the said Austin Water, Light and Power Company, heirs and assigns forever: and we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Austin Water, Light and Power Company, and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands at Austin, Texas, this 28th day of June, 1887.

Signed, sealed and delivered in presence of:

THE CITY WATER COMPANY, [SEAL]
By
M. D. MATHER,
President. [SEAL]

Attest:
D. LACY B. WICKES,
Secretary City Water Company. [SEAL]

I, D. Lacy B. Wickes, Secretary & Treasurer of Austin Water, Light and Power Company hereby certify that the above and foregoing instrument is a true and correct copy of the original now in my possession.

D. LACY B. WICKES,
Secretary & Treasurer.

(*Endorsement.*) Exhibit E 3.—No. 207 Eq.—Filed Jan. 3, 1895, D. H. Hart, Clerk, By O. H. Millican, Deputy.

EXHIBIT "E 4" TO ORIGINAL BILL.

Filed Jan. 3, 1895.

44 AUSTIN, TEXAS, June 28th, 1887.

KNOW ALL MEN BY THESE PRESENTS, that the City Water Company, under resolution of its stock holders of date June 23rd, 1887, and in consideration of the sum of One Thousand (1,000) Dollars cash in hand paid by the Austin Water, Light and Power Company, of the County of Travis and State of Texas, the receipt of which is hereby acknowledged, have granted, sold, conveyed and released, all their right, title and interest to the following described property, to-wit: all office furniture, safe, fittings, fixtures,—subject to deeds of trust of date July 1, 1882, and October 1st, 1883.

CITY WATER COMPANY,
By
M. D. MATHER,
Prest.

Attest:
D. L. WICKES,
[SEAL] *Sec'y.*

(*Endorsement.*) City Water Co. to Austin W. L. & Power Co.—Exhibit E 4.—No. 207 Eq. Filed Jan. 3, 1895, D. H. Hart, Clerk, By O. H. Millican, Deputy.

EXHIBIT "E 5" TO ORIGINAL BILL.

Filed Jan. 3, 1895.

AUSTIN, TEXAS, June 28th, 1887.

KNOW ALL MEN BY THESE PRESENTS, that the City Water Company, under a resolution of its stockholders bearing date June 23rd, 1887, and in consideration of the sum of Eighty Five ($85,000.00) Thousand Dollars, cash in hand paid by the Austin Water, Light and Power Company of the County of

Travis and State of Texas, the receipt of which is hereby acknowledged, have granted, bargained, sold and conveyed and released unto the said Austin Water, Light and Power Co., all their right, title and interest in and to the following described property, to-wit: one Gaskell pumping engine, one Holly Quadruplex engine, three boilers and building and coal shed, with all connections and fixtures, side-track, tools, situated on lots Nos. 1, 2, 3 and 4, in block No. 187, in the City of Austin,
Travis County, Texas,—subject to deeds of trusts
45 bearing date July 1st, 1882, and Oct. 1st, 1883.

CITY WATER COMPANY,
By
M. D. MATHER,
President.

Attest:
D. L. WICKES,
[SEAL] *Secretary.*

(*Endorsement.*) City Water Co. to Austin Water, Light and Power Co. Exhibit E. 5.—No. 207 Eq.—Filed Jan. 3, 1895. D. H. Hart, Clerk, By O. H. Millican, Deputy.

EXHIBIT "E 6" TO ORIGINAL BILL.

Filed Jan. 3, 1895.

AUSTIN, TEXAS, June 28th, 1887.

KNOW ALL MEN BY THESE PRESENTS, that the City Water Company, under a resolution of its stockholders bearing date June 23rd, 1887, and in consideration of the sum of Eighty Four Thousand ($84,000) Dollars cash in hand paid by the Austin Water, Light and Power Company of the County of Travis and State of Texas, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed and released unto the said Austin Water, Light and Power Company, all their right, title and interest in and to the following described property, to-wit: Three filtering wells constructed

of stone, also all suction pipe 12" 20" and 24" in their inner diameter, valves, &c. situated on lots No. 1, 5, 6, 7 and 8 in block 186; also all distributing mains now layed in the City of Austin and its vicinity; also all hydrants and connections, subject to deeds of trusts bearing dates July 1, 1882 and October 1st, 1883.

CITY WATER COMPANY,
By
M. D. MATHER,
Prest.

Attest:
D. L. WICKES,
[SEAL] *Sect'y.*

(*Endorsement.*) City Water Company to Austin Water, Light and Power Co. Exhibit E 6.—No. 207 Eq.—Filed Jan. 3, 1895, D. H. Hart, Clerk, By O. H. Millican, Deputy.

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46 EXHIBIT "F" TO ORIGINAL BILL.

Filed Jan. 3, 1895.

AUSTIN, TEXAS, June 28, 1887.

KNOW ALL MEN BY THESE PRESENTS, that the Austin Electric Light Company, under a resolution of its stockholders bearing date June 27th, 1887, and in consideration of the sum of Seventeen Thousand Five Hundred Dollars ($17,500.00) cash in hand paid by the Austin Water, Light and Power Company, of the County of Travis and State of Texas, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed and released unto the said Austin Water, Light and Power Company, all their right, title and interest in and to all the property, dynamos, engines, building, poles, wires, lamps, franchises, contracts, rights of way, &c.—subject to a deed of trust for the sum of Twenty Five Thousand Dollars of date May 1st, 1886; also subject

to a floating debt amounting to the sum of Three Thousand Seven Hundred and Twenty Three and 56/100 ($3723.26) Dollars.

VICTOR MATHER,
President Austin Electric L. Co.

Attest:
D. LACY B. WICKES,
[SEAL] *Sect'y Austin Electric L. Co.*

(*Endorsement.*) Austin E. L. Comp'y. to Austin Water, Light & Power Co. Exhibit F.—No. 207 Eq.—Filed Jan. 3, 1895, D. H. Hart, Clerk, By O. H. Millican, Deputy.

EXHIBITS "G AND H" TO ORIGINAL BILL.

Filed Jan. 3, 1895.

EXHIBIT "G."

Be it resolved by the City Council of the City of Austin:

That whereas, on the 31st day of March, 1890, the
47 said council enacted an ordinance as follows:

An ordinance, ordering an election to obtain consent of the property tax paying qualified voters of the City of Austin, to the extension by the City Council of the bonded indebtedness of the City of Austin, for the purpose of constructing a system of water works and furnishing lights for the City of Austin.

SECTION 1. Be it ordained by the City Council of the City of Austin, that an election be and the same is hereby ordered and directed to be held in the City of Austin, on Monday the 5th day of May, A. D. 1890, from 9 a. m. until sunset, for the purpose of obtaining the consent of two-thirds of the qualified voters of the City of Austin who pay taxes on property in said City, to an extension of the bonded debt of the city in the sum of one million and four hundred thousand dollars beyond the existing bonded indebtedness of one hundred and twenty five thousand dollars, for the purpose of constructing

a system of water works, and to furnish light for the city and the citizens thereof.

SEC. 2. That the Mayor shall issue his proclamation giving notice of said election and of the object thereof and of the time and place of holding the same for at least thirty days before the day of said election.

SEC. 3. That all qualified voters of the City of Austin who pay taxes on property in said city shall be entitled to vote at said election.

SEC. 4. The polls of said election shall open in the several wards of the city at the following named places, and the following named persons are hereby appointed judges of said election for their respective wards:

For the First Ward: O. Archer, R. C. Shelley, P. L. Meyer.

For the Second Ward: B. S. Pillow, S. G. Kingsbury, F. M. Maddox.

For the Third Ward: Joe Harrell, Sr., E. C. Bartholomew and Henry Hirshfeld.

For the Fourth Ward: T. L. Wren, Clarence Hunter, Charles Caldwell.

For the Fifth Ward: Geo. Warren, Max Maas, S. D. DeCordova.

For the Sixth Ward: J. P. Crain, Louis Marcuse, A. C. Hill.

For the Seventh Ward: H. L. Spain, Joe B. Rogers, W. W. Ardher.

For the Eighth Ward: A. Deffenbaugh, Joe Lee, Joe A. Costa.

48 For the Ninth Ward: Horace Holly, R. M. Castleman, S. H. Weaver.

For the Tenth Ward: S. K. Morley, D. W. Weaver, A. L. Teagarden.

SEC. 5. That the ballots used at said election shall be printed and furnished by the City of Austin as is now provided by ordinance; and each ballot shall have printed thereon the following, to-wit:

In favor of extending the bonded debt of the City of Austin

in the sum of One Million and Four Hundred Thousand Dollars for the purpose of building water works and furnishing light for the city.

Against the proposed extension of the bonded debt of the City.

The voter shall prepare his ballot by marking over with pencil or ink one of the foregoing expressions, and leaving the other as expressing his vote.

SEC. 6. That the said election shall be held in the following places:

In the First Ward: at Glass Building.

In the Second Ward, at Kingsbury's stable.

In the Third Ward, at the City Hall.

In the Fourth Ward, at Goodman's Store.

In the Fifth Ward, at house of Hose Protection Fire Company, No. 3.

In the Sixth Ward, at Dabney's Building.

In the Seventh Ward, at Wellmer's Mill.

In the Eighth Ward, at County Court House.

In the Ninth Ward, at S. H. Weaver's Stable.

In the Tenth Ward, at Hofheintz' Store.

Passed March 31, 1890. Approved April 1, 1890.

JOHN McDONALD,
Mayor.

Attest:

MILTON MORRIS,
City Clerk.

EXHIBIT "H."

AND WHEREAS, pursuant to said ordinance, which was duly approved on April 1st, 1890, by Hon John McDonald, Mayor of said City, and pursuant to a proclamation issued by said Mayor, thirty days prior thereto, an election was duly held on the 5th day of May, 1890, at which election, it appears from the returns, made and declared, counted and duly
49 returned in accordance with law, 1354 duly qualified electors voted in favor of said proposition, and fifty duly qualified electors voted against it.

Now, therefore—be it resolved by the City Council of the City of Austin, and it is hereby declared and ordained that more than two-thirds of the qualified voters of the City of Austin who pay taxes on property, having property in said city, having voted in favor of an extension of the bonded debt of said city in the sum of One Million, Four Hundred Thousand Dollars, for the purpose of constructing a system of water works, and to furnish light for the city and the citizens thereof, and that therefore the power to extend the bonded debt of said City beyond the sum of One Hundred and Twenty-Five Thousand Dollars, has been duly conferred upon the City Council in the manner provided by law.

Adopted May 5, 1890. Approved May 6, 1890.

JOHN McDONALD,
Mayor.

Attest:
MILTON MORRIS,
City Clerk.

(*Endorsement.*) Exhibit G. Exhibit H.—No. 207 Eq. Filed Jan. 3, 1895, D. H. Hart, Clerk, By O. H. Millican, Deputy.

EXHIBIT "I" TO ORIGINAL BILL.

Filed Jan. 3, 1895.

EXHIBIT "I."

An ordinance, to provide for the issuance and sale of the bonds of the City of Austin to the amount of One Million Four Hundred Thousand Dollars for the purpose of erecting a system of water works and furnishing light by and to the City of Austin, and to regulate the disbursement of their proceeds.

SECTION 1. Be it ordained by the City Council of the City of Austin—that in accordance with the ordinance entitled:

An ordinance ordering an election to obtain the consent of the property tax-paying voters of the city of Austin to the extension by the City Council of the

bonded indebtedness of the City of Austin for the purpose of constructing a system of water works and furnishing lights for the City of Austin; approved April 1st, 1890; and in accordance with the result of an election by the qualified voters by the said City of Austin who pay taxes on property in said City of Austin, duly under said last named ordinance on the 5th day of May, 1890, at which said election more than two-thirds of such voters of the said City of Austin, (to-wit: thirteen hundred and fifty-four for, and fifty against) voted in favor of the issuance of the bonds of the said City of Austin to the amount and for the purpose set forth in the caption of this ordinance; and in accordance with a resolution of the City Council ascertaining and declaring the result of the said election; approved on the 6th day of May, A. D. 1890, the City Clerk, under the direction of the Mayor, is hereby directed to forthwith cause to be prepared one thousand four hundred bonds of the City of Austin, of the denomination of one thousand dollars, gold, each.

SECTION 2. That the said bonds shall be in words substantially as follows, to-wit:

THE STATE OF TEXAS,

No. . *City of Austin.* $1000.00 Gold.

WATER WORKS AND ELECTRIC LIGHT BONDS.

The City of Austin hereby promises to pay to the bearer, one thousand dollars in the gold coin of the United States, on the first day of July, A. D. one thousand nine hundred and thirty, with interest also payable in U. S. gold coin, from date until paid at the rate of five per centum per annum, payable quarterly, on the first day of October, January, April and July, respectively of each year, on presentation of the interest coupons hereto attached at the office of the
in the City of New York, U. S.

This is one of a series of one thousand four hundred bonds of like denomination, date and conditions, numbered 1 to 1400, both numbers inclusive, issued by the City of Austin, Texas, in accordance with an ordinance entitled, an ordinance

to provide for the issuance and sale of the bonds of the City of Austin to the amount of one million four hundred
51 thousand dollars for the purpose of erecting a system of water works and furnishing light by and to the City of Austin, and to regulate the disbursement of their proceeds; approved on the 23rd day of July, A. D. 1890, said last named ordinance having been passed under and in accordance with an ordinance ordering an election to obtain the consent of the property tax paying voters of the City of Austin to the extension by the City Council of the bonded indebtedness of the City of Austin for the purpose of constructing a system of water works and furnishing light for the City of Austin, approved April 1, 1890;—and also in accordance with the result of an election by the qualified voters of the said City of Austin, duly held under said last named ordinance on the fifth day of May, A. D. 1890, at which said election more than two-thirds of such voters of said City of Austin (to-wit: thirteen hundred and fifty four for and fifty against) voted in favor of the issuance of the bonds of said city of Austin to the amount and for the purpose set forth in the caption of the first above named ordinance; and also in accordance with a resolution of the City Council ascertaining and declaring the result of the said election approved on the sixth day of May, A. D. 1890, and under the provisions of the said ordinance authorizing the issuance of these bonds the annual net income, (or so much thereof as may be necessary to discharge the annual interest and sinking fund) from the receipts of the system of water works and light, erected with the proceeds of these bonds, is to be applied, and is pledged to the payment of the same, principal, interest and sinking fund, and full provision is therein made for the levy and collection of the taxes necessary to pay the interest on these bonds and two per cent. sinking fund annually, as required by the Constitution and laws of the State of Texas, and the charter of the City of Austin.

The City of Austin hereby reserves the right to redeem any or all of these bonds at any time after the thirtieth day of June, A. D. 1910, in numerical order, commencing with bond

number one, the redemption thereof to be advertised in one Newspaper published in the City of Austin, Texas, and in one Newspaper published in the City of New York, N. Y., not less than thirty days before the period of such redemption, whereupon said bonds and the coupons thereto attached shall cease to bear interest.

52 *In witness whereof* the City of Austin has caused these presents to be signed by , Mayor of said City, and by , City Clerk of said City, and tested with the seal of said City of Austin, this the first day of August, A. D. eighteen hundred and ninety, at the City Hall of said City.

Mayor.

City Clerk.

Registered , Treasurer of the City of Austin.

(Form of Coupon.)

On the first day of January, A. D. 1891, the City of Austin promises to pay to the bearer at the office of in New York, U. S., Twelve 50-100 Dollars in U. S. Gold coin, being for three months interest on City of Austin Water Works and Electric Light Bond No. .

Mayor.

City Clerk.

On the first day of October, A. D. 1890, the City of Austin promises to pay to the bearer at the office of in New York, U. S., eight 331/3-100 Dollars in U. S. Gold coin, being for two months interest on City of Austin Water Works and Electric Light Bond No. .

Mayor.

City Clerk.

ENDORSED ON BACK OF BONDS.

Constitutional provisions of the State of Texas, governing the creation of debt by Municipal Corporations, Article VI., Section 3.

All qualified electors of the State as herein prescribed, who shall have resided for six months immediately preceding an election within the limit of any city or corporate town shall have the right to vote for Mayor and all other elective officers; but in all elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incor-
53 porated town; provided that no poll tax for the payment of debts thus incurred shall be levied upon the persons debarred from voting in relation thereto.

ARTICLE XI., Section 5. Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the Legislature and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of said city; and no debt shall ever be created by any city, unless at the same time provision is made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent. thereon.—Charter provisions of the City of Austin governing the creation of debt.

ARTICLE VI., Section 1, Classes 1 and 2. The Mayor and City Council shall have power within the city by ordinance.

First.—To levy and collect an annual tax not exceeding one per centum upon all property within the limits of the city, made taxable by law for State and County purposes, the money raised by said tax to be used for the current expenses, and for the general improvement of the city.

Second.—To raise money on the credit of the city for a special and definite purpose, by issuing bonds of the city or otherwise; *provided*, the bonded debt of the city shall not at any time exceed one hundred and twenty five thousand dollars; and the interest due on bonds and interest bearing warrants issued by the City of Austin, with the interest accrued

thereon shall be at all times considered a part of the bonded debt of the City.

To extend the bonded debt of the city beyond one hundred and twenty five thousand dollars, shall only be done by a special act of the legislature, or by the consent of two-thirds of the tax paying citizens voting at an election ordered for the purpose after thirty days notice by the Mayor, by the authority of and in the method that may be prescribed by the City Council.

All bonds shall specify for what purpose they were issued, and when any bonds are issued by the city, a fund shall be provided to pay the interest, and two per cent. per annum on the principal as a sinking fund to redeem the bonds, or pay them at maturity; and said sinking fund shall not be diverted to, or drawn for any other purpose, and the City Treasurer shall honor no draft drawn on said sinking fund except to pay the interest or redeem the bonds for which said fund was provided.

54

The sinking fund for the redemption of any bonds and the payment of the interest thereon shall be invested, as fast as the same accumulates, in interest bearing bonds of the United States, or of the City of Austin, as the City Council may deem most advantageous; and such bonds and the interest thereon shall be sold when necessary to pay or redeem the bonds for which the sinking fund was established.

Election Ordinance.

An ordinance ordering an election to obtain the consent of the property tax paying qualified voters of the city of Austin, to the extension by the City Council of the bonded indebtedness of the City of Austin, for the purpose of constructing a system of water works and furnishing lights for the City of Austin.

Section 1. Be it ordained by the City Council of the City of Austin, that an election be and the same is hereby ordered and directed to be held in the City of Austin on Monday the 5th day of May, A. D. 1890, from 6 o'clock A. M. until sunset for the purpose of obtaining the consent of two thirds of the qualified voters of the City of Austin, who pay taxes on property in said city, to an extension of the bonded debt of

the City in the sum of One Million and Four Hundred Thousand Dollars beyond the existing bonded indebtedness of one hundred and twenty five thousand dollars, for the purpose of constructing a system of water works and to furnish light for the city and citizens thereof.

SEC. 2. That the Mayor shall issue his proclamation giving notice of said election, and of the object thereof, and of the time and place of holding the same for at least thirty days before the day of said election.

SEC. 3. That all qualified voters of the City of Austin who pay taxes on property in said city shall be entitled to vote at said election.

SEC. 4. The polls of said election shall be open in the several wards of the city at the following named places, and the following named persons are hereby appointed Judges of said elections for their respective wards. * * *

55 SEC. 5. That the ballots to be used at said election shall be printed and furnished by the City of Austin as is now provided by ordinance: and each ballot shall have printed thereon the following, to-wit:

In favor of extending the bonded debt of the City of Austin in the sum of one million and four hundred thousand dollars for the purpose of building water works and furnishing light for the city.

Against the proposed extension of the bonded debt of the city.

The voter shall prepare his ballot by marking over with pencil or ink one of the foregoing expressions, and leaving the other as expressing his vote.

SEC. 6. That the said election shall be held in the following places:

* * * * * * *

Passed March 31, 1890. Approved April 1st, 1890.

JOHN McDONALD,
Mayor.

Attest:

MILTON MORRIS,
City Clerk.

Vote for the issuance of these bonds	1,354
Votes against the issuance of these bonds	50
Total	1,404

(End of endorsement on back of bonds.)

SECTION 3. That the said bonds shall bear date and be issued on the first day of August, A. D. 1890; *provided* that they shall not be delivered and shall not be valid until they shall have been registered by the Treasurer of the City of Austin, or his successor, in a book kept by him for that purpose; such registration to be evidenced by his statement to that effect over his signature, made on each bond at the time of its delivery.

SECTION 4. That the said bonds shall be sold and negotiated for less than their par value.

SECTION 5. That the said bonds shall be sold or negotiated by the Mayor, under the direction of the City Council at such times and in such amounts as may be needed for the prompt and efficient erection of a system of water works and light for the City of Austin.

SECTION 6. That the proceeds of said bonds shall be
56 paid to the City Treasurer who shall keep a true and faithful account of the same, separately from other city funds and accounts.

SEC. 7. That the City Treasurer shall give bond in the sum of One Hundred Thousand Dollars to be approved by the City Council, for the faithful administration of the proceeds of said bonds and of the water works tax and moneys, such official bond to be prepared by the City Attorney.

SEC. 8. That the said fund shall be known as the water works and light fund, and shall not be used, appropriated, paid out or diverted for any other purpose than the erection of the said water works and light system.

SEC. 9. That the said water works and light fund shall be appropriated by the City Council, and warrants shall be drawn thereon, in the manner provided for by ordinance for other city funds.

SEC. 10. That there shall be levied and collected for the

year A. D. eighteen hundred and ninety, and for and during each year thereafter as long as the said water works and light bonds shall be out standing, a tax of one dollar and eleven and one half cents ($1.11½) on the One Hundred Dollars worth of property made taxable by the charter of the City of Austin and the Constitution and laws of the State of Texas, for the purpose of paying the interest and two per centum sinking fund annually on the said bonds.

SEC. 11. That the said tax shall be assessed, levied and collected in the same manner and on the same property, and at the same time as may be provided for by the ordinances regulating taxation for other purposes in the City of Austin.

SEC. 12. That the net income (or so much thereof as may be necessary) from the receipts of the said system of water works and light shall be applied, and they are hereby pledged, to the payment of the bonds herein provided for, principal, interest and sinking fund, in accordance with the terms of the said bonds; and the rates for service of the said system of water works and light shall be so regulated that the receipts shall be sufficient to at least pay the interest and annual sinking fund on the said bonds and the operating expenses of the said works.

SEC. 13. That the said tax shall be known as the water works tax, and the City Collector and the City Treasurer shall
57 keep correct accounts of the same under the heads of Water Works Sinking Fund and Water Works Interest Funds, and shall in other respects collect, manage and disburse the said funds as may be by ordinance provided for other public revenues and funds.

SEC. 14. The City Collector shall give bond in the sum of Twenty Five Thousand Dollars for the faithful discharge of his duties in connection with the said funds, the said bond to be prepared by the City Attorney and approved by the City Council.

SEC. 15. That this ordinance shall be in force and take effect from and after its passage.

Passed July 21st, 1890. Approved July 23rd, 1890.

(*Endorsement.*) Exhibit I.—No. 207 Eq.—Filed Jan. 3, 1895, D. H. Hart, Clerk, By O. H. Millican, Deputy.

EXHIBIT "K" TO ORIGINAL BILL.

Filed Jan. 3, 1895.

NEW AUSTIN CITY CHARTER.

Adopted in 1891.

H. B. No. 636. An Act to Incorporate the City of Austin, to grant it a new charter, and to extend its boundaries.

SECTION 1. *Be it enacted by the Legislature of the State of Texas:* That the inhabitants of the City of Austin, in Travis County and State of Texas, residing within the territory herein described, shall continue to be, and are hereby constituted a body politic and corporate by the name and style of the City of Austin, and by that name shall have perpetual succession, and shall have all the rights, property, real, personal and mixed, immunities, powers, privileges and franchises now possessed or enjoyed by said city, or herein granted, and be subject to all its present liabilities, and may have a common seal, and alter the same at pleasure, and may sue or be sued, plead or be impleaded, in all courts of law
58 and equity; may contract and be contracted with; may take, hold and convey, lease or acquire or dispose of any property whatever for corporation purposes, within the city limits.

SEC. 2. That the boundaries of the city shall be as follows: beginning on the bank of the Colorado river, at the southwest corner of out lot No. 64, in Division O, thence northerly in a straight line to the northwest corner of out lot No. 16, in Division C, being the Northeast corner of the Wells tract of land Northeast of the old Fair Grounds tract, Thence Northwesterly with the Northeast line of said Wells tract and the State Lunatic Asylum grounds, and the North boundary line of out lot 83, in Division D, to the Northwest corner of out lot 83, division D, thence Southwesterly in a straight line to within ten varas of the Colorado river's ordinary water level (after the completion of the dam now being constructed) due west to Cypress Springs, as said level

has been determined by a line surveyed and marked under direction of the city authorities; thence up the east bank of the Colorado river within ten varas of said line so surveyed, twenty-one miles by following the river; thence across said river at right angles a distance of ten varas from said water level line surveyed and marked on the west side of said river; thence down the Colorado river within ten varas of said surveyed line to a point 1440 varas above the up-stream face of the said proposed dam now being constructed; thence north 75 degrees west 1152 varas; thence due south 1555 varas; thence north 87 degrees and 30 minutes east 556 varas, more or less, to the Colorado river one hundred yards below the lower part of the site of the said dam; thence down the west bank of the Colorado river with its meanders to the mouth of Barton's Creek; thence up Barton's Creek on the west side thereof to a point due west of where the west line of the Isaac Decker league prolonged in its course northerly would intersect Barton's Creek; thence easterly across Barton's creek to the western boundary line of said Decker league; thence southwesterly with the western boundary line of said Decker league to the southwest corner of lot No. 34 in Bradley's subdivision of the Goodrich estate on said Decker league, being also the northwest corner of the D. P. Kinney tract on said Decker league; thence to the southwest corner of the H. J. Doughty tract on said Isaac Decker league; thence
59 easterly in a straight line to the northeast corner of Mrs. E. V. Blum's 213 acre tract, being the southeast corner of the subdivision known as Southside; thence in a northerly direction with the east boundary line of said subdivision and the east boundary line of the Jno. D. McCall and D. C. Stone tracts to the centre of the channel of the Colorado river; thence down said river in a straight line to the place of beginning.

SEC. 3. That the City of Austin shall be divided into not exceeding eleven wards.

The boundaries of the wards shall be fixed by the City Council as soon as this act takes effect, and may be changed from time to time as the City Council may see proper, having

regard to the number of male inhabitants so that each shall contain as nearly as may be the same number; *provided*, that after the first general election under this act, no change in wards or boundaries thereof shall be made within six months next preceding a general election to be held in said city.

ORGANIZATION AND PROCEDURE OF THE CITY COUNCIL.

SEC. 4. That the City Council shall consist of a Mayor and a board of aldermen, who shall hold their office for two years from their installment, and until their successors are elected and qualified.

SEC. 5. That the board of aldermen shall consist of two members from each ward, who shall be residents thereof, to be chosen by the qualified voters of their respective wards.

SEC. 6. That there shall be an election held on the first Monday in December of each year to fill all vacancies occurring, or to occur in the city council from the expiration of terms of office.

SEC. 7. That no person shall be a member of the city council unless he be a citizen of the State of Texas, and shall have resided within the city limits for six months next preceding his election, and shall have been a *bona fide* resident of the ward from which he is elected for at least thirty days preceding his election.

SEC. 8. That if any alderman shall after his election, remove from the ward from which he is chosen, his office shall thereupon become vacant.

SEC. 9. That the city council shall be the judge of the election and qualification of its members, and shall determine contested elections of all city officers made elective under this act, in such manner as may be provided by ordinance; *provided* that no alderman nor the Mayor shall be allowed to qualify or requalify, if he succeeds himself in office, until at a session of the city council, to be held on or after the Saturday next succeeding the election, which shall in all cases occur on Monday, unless his opponent in the election or all opponents, if more than one, shall sooner file a

statement with the City Clerk, that he or they will not contest the election of his or their opponents, naming him.

If, prior to the time for installing such newly elected Mayor or alderman, a contest of his election is filed in writing with the city clerk, stating the grounds for the contest, he shall not be installed until such contest is determined nor shall the council elect the other city officers until such contests are determined; *provided*, that all contested elections shall be decided within fifteen days from the date of the election.

SEC. 10. That the majority of the city council shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members by arrest or in such manner, and under such further penalties as they may prescribe.

SEC. 11. That the city council may determine the rules of its proceedings, punish its members for a wilful violation of its rules, or other disorderly behavior and with the consent of two-thirds of the members elected, expel an alderman, but not a second time for the same offense.

SEC. 12. That the city council shall keep a journal of its proceedings, and whenever practicable, publish the same, or a synopsis thereof, in some newspaper published in the city; and the yeas and nays of the members on any question shall, at the desire of any alderman present, be entered on the journal.

SEC. 13. That upon the passage of all ordinances appropriating money, imposing taxes, increasing, lessening or abolishing licenses, and of ordinances for borrowing money, the yeas and nays shall be entered on the journal, but no ordinance for borrowing money shall pass, except by a vote of two-thirds of the whole council.

SEC. 14. That all ordinances and resolutions of a
61 general character shall be read in the council on three separate days, unless two thirds of the council elected shall dispense therewith.

SEC. 15. That a majority of the members of the whole council shall be necessary to pass an ordinance for any purpose appropriating the sum of five hundred dollars or upwards,

or for passing an ordinance in any wise diminishing or increasing the city revenues.

SEC. 16. That aldermen shall receive as their compensation the sum of five dollars for attending each regular meeting of the city council; *provided* the sum shall not exceed the sum of ten dollars per month; but no alderman nor the Mayor shall, during the term for which he is elected, hold or be eligible to any other office under the city, nor shall any other alderman, during his term of office, be interested directly or indirectly, in any contract or agreement for work to be done, or material furnished, or service to be performed, for which the city is to pay a consideration, or in the purchase or sale of any property by the city for any purpose whatever, and for the violation of any part of section sixteen the penalty shall be expulsion from office on an affirmative vote of two thirds of the whole board of aldermen.

SEC. 17. That all vacancies that shall occur in the Board of aldermen, except by expiration of terms of office, shall be filled in such manner as may be provided for by ordinance. Each alderman shall, before entering upon the duties of his office, take the oath prescribed by the Constitution of the State of Texas, and that he will faithfully discharge the duties of his office.

SEC. 18. That at the first meeting of the city council after each general election, and after contest of election of aldermen, if any there be, are disposed of, the council shall elect one of their members president of the board of aldermen, who shall hold his office for one year from the date of his election and until his successor is elected and qualified.

SEC. 19. That the president of the board of aldermen, in case of the absence of the Mayor from a session of the council, act as presiding officer of the council.

SEC. 20. That in case of the death, resignation or inability to act, or absence of the Mayor from the city, the president of the council shall perform all the duties of Mayor.

62 SEC. 21. That in the absence of the Mayor and of the president of the Council, any alderman may be elected by the members present, to preside, who shall exercise all the rights of the president of the council in such cases.

SEC. 22. That the president of the board of aldermen shall vote only as an alderman.

SEC. 23. That there shall be stated sessions of the city council at least once in each month, and such special meetings as the Mayor or any five members of the council may deem necessary.

SEC. 24. That calls for special meetings shall state the nature of the business to be transacted at the meeting, and shall be read to each alderman to be found in the city, or if an alderman is out of the city a copy thereof left at the place of business of such alderman as may not be seen in the person by the policeman of the City of Austin serving the notice, who shall report in writing to the council, at the hour set for the meeting, whom he has served and how he has served such notices, and the reason for not serving each alderman in person. If it shall appear that two thirds of the aldermen have been served personally, the council may proceed to transact the business mentioned in the call, as if all the aldermen had been personally notified of the meeting. The said notice and the return of the officer shall be recorded in the minutes of the meeting of the council, and shall be evidence of the nature of the call and the service of the notice thereof.

SEC. 25. That all ordinances and resolutions of a general character adopted by the city council, and all acts of the council authorizing or making any contracts, grants or concessions, whether such an act be had or passed in response to petition or proposition, or in any manner whatsoever, and irrespective of the form of such act, shall be subject to the veto of the Mayor.

SEC. 26. That the Mayor may veto any one or more of the items in an appropriation ordinance, and approve the remainder.

SEC. 27. That all ordinances, resolutions and acts of the council, together with such papers as may pertain thereto, shall be placed in the office of the city clerk, and if the Mayor approve thereof, he shall endorse the same "approved" and sign his name to such endorsement, and thereupon such ordinances, resolutions and acts shall go into effect.

63 SEC. 28. That if the Mayor shall fail to approve any such ordinance, resolution or act for a longer period than ten days after it shall be placed in the City Clerk's office, it shall go into effect, unless he shall have within the said period signified his disapproval thereof, or of items of an appropriation ordinance, by written objections there filed with the City Clerk for the consideration of the city council.

SEC. 29. That the vote by which any ordinance, resolution or act so disapproved by the Mayor was passed, shall be considered by the city council either at the next regular meeting thereof held after such disapproval is filed in the Clerk's office, or at any special meeting called earlier for that purpose; and if after such reconsideration, two thirds of the aldermen elected agree to pass such ordinance, resolution or act, or items of an appropriation ordinance, it shall be in force, but not otherwise.

SEC. 30. That the style of the ordinances of the city shall be: "Be it ordained by the city council of the City of Austin."

SEC. 31. That every ordinance imposing a penalty, fine, imprisonment or forfeiture, for violation of its provisions, shall after the passage thereof be published in every issue of a daily paper published in said city for ten days, and shall not take effect until such publication has been completed.

The City Clerk shall note on such ordinances as are required to be published, the fact that the same have been published as required by the charter, and the date of such publication, which shall be *prima facia* evidence of such publication; *provided*, that the provision of this section shall not apply to revision and codification of the ordinances of the city as the council may from time to time adopt.

SEC. 32. All other ordinances and resolutions shall take effect on being approved by the Mayor, or on the termination of the time allowed for vetoing ordinances without being vetoed, unless another time for taking effect be fixed by the ordinance or resolution.

SEC. 33. That in case of a tie vote by the council, the Mayor shall have the casting vote.

64 GENERAL POWERS OF THE CITY COUNCIL.

SEC. 34. That the city council shall have the care, management and control of the city and its property and finances, except as may be herein otherwise specially provided for; and shall have the power to enact and ordain any and all ordinances not repugnant to the constitution and laws of the State, and such ordinances to alter, modify or repeal.

TAXATION.

SEC. 35. That the city council shall have power within the city by ordinance to levy and collect annual taxes not exceeding for any and all purposes, including the taxes levied for the support of the public schools, two and one half per cent. of the property values of said city, as follows:

1. An annual tax, not exceeding one per centum upon all property within the limits of the city, made taxable by law for State and County purposes, the money raised by said taxes to be used for the current expenses and for the general improvement of the city or its property.

2. To raise such further amount as may be necessary to pay interest on two per cent. sinking fund annually on all valid bonded debt of the city.

3. To raise money on the credit of the city for a special and definite purpose, by issuing bonds of the city or otherwise; *provided*, the bonded debt of the city shall only be increased by a special act of the legislature, or by consent of two-thirds of the qualified voters in said city who pay taxes on property, real or personal, in said city. All persons owning property, real or personal, subject to taxation in said city on the first day of Jannary next preceding any election that may be held to obtain such consent, shall be deemed to be persons who pay taxes on property in said city. Such election shall be ordered by the city council, and notice thereof shall be given for at least thirty days by the Mayor in such manner as shall be prescribed by the city council; *provided*, that whatever power the city council may

have possessed or acquired under the charter in force in said city prior to the passage of this act through any election held under said charter to increase the indebtedness of said city is hereby continued and perpetuated in said council, and may be exercised under this act with the same effect that such power might have been exercised under said charter if this act had not been passed, and to no further extent and with no further force or effect under this act than might have been done without the passage of this act; *provided further*, that lands within the limits of the city which have not been laid off into blocks and lots shall not be assessed or taxed otherwise than by the acre, and shall continue to be so assessed and taxed until laid off into lots and blocks by the owners thereof, respectively, and the owners of such lands in laying off the same into lots and blocks shall so arrange the streets that they shall correspond as near as practicable with previously established streets of the city.

SEC. 36. That all such bonds shall specify for what purpose they were issued. Provision shall be made to pay the interest, and not less than two per cent. annually of the principal, to redeem or pay the bonds.

SEC. 37. That neither the money for which said bonds may be sold, nor the money raised to pay the interest and sinking fund thereof, shall be used to divert to any other purposes, and the City Treasurer shall not honor any draft drawn on said interest and sinking fund except to pay the interest on said bonds or to redeem the same, except as hereinafter provided.

SEC. 38. That said sinking fund shall be invested whenever as much as one thousand dollars shall be accumulated, in interest bearing bonds of the United States, or of the State of Texas, or the City of Austin.

SEC. 39. That the city council may and shall have full power to provide by ordinance for the prompt collection of all taxes levied, assessed and due or becoming due to said city, and to that end may and shall enact all ordinances deemed necessary to the levying, imposing, assessing and collecting any of said taxes; and to regulate the mode and manner of making out tax lists and inventories and the appraisement of

property thereon, and to prescribe the oath that shall be administered to each person on such rendition of property; and to prescribe when and how property shall be rendered and the taxes paid; and to fix the duties and define the powers of the assessor and collector of taxes.

SEC. 40. That all taxes due by property owners as appears upon the rolls of said city and upon rolls prepared and completed up to the first day of July, 1891, and not barred by the statutes of limitations, may be collected by suit from delinquents and foreclosure of the lien securing the same, in any court having jurisdiction; but no suit shall be brought for taxes assessed after the first day of July, 1891, except after the time set for sales of taxes as hereinafter provided.

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SEC. 41. That the city council shall have full power and authority to provide by ordinance for the appointment of a board of equalization, and to regulate their duties and to provide for notices to be given to tax payers to appear before such board; and all the determinations of such board shall be final, unless an appeal is taken therefrom to the County Court of Travis County, which may be done by any person, or the agent or attorney of any person aggrieved at the action of the board, by giving notice in writing to said board of such appeal and the grounds thereof within five days after such board shall have concluded its labors and returned the tax list to the office of the assessor and collector of taxes, and by giving a bond payable to the city to be approved by the city assessor and collector, for the sum of fifty dollars, conditioned that said appellant will pay all the costs of such appeal if the action of the board of appraisers should be sustained by the county court, or if the valuation of the property of such appellant shall be raised above the amount at which it was assessed by said board of appraisers. A copy of such bond and such notice of appeal, and a description made by the assessor and collector, of the property of the appellant involved therein shall be filed in said county court, and said case shall be docketed on the civil docket of said court in the name of appellant as plaintiff against the board of appraisers of the city of Austin,

and all such appeals shall be prosecuted to the first term of the county court after the notice of appeal is given, and shall have precedence for trial of all civil cases in said court, and the decision of said county court in such matters shall be final. The list of property and the values thereof as settled by the board of appraisers, or a copy thereof, or so much thereof as may be pertinent to the question at issue may be produced in court to be used in such trials.

SEC. 42. That the city council shall have full power and authority to provide for seizure by the assessor and collector, and sale by him of any personal property for taxes due on personal property without the necessity of any writ 67 and such tax rolls shall be sufficient warrant for such seizure and sale by the assessor and collector of taxes; and to provide by ordinance that any firm, corporation or person owning or controlling property in said city subject to a tax, and failing or refusing to render a list, inventory or appraisement thereof, verified by affidavit, shall be liable to a fine upon complaint to the recorder, in such sum as such ordinance may provide, not exceeding two hundred dollars.

SEC. 43. That the city council shall have full power and authority to pass all ordinances necessary to regulate advertisements and sales by the assessor and collector of property upon which taxes may be unpaid, and to provide for the perpetuation of all proceedings with reference to such advertisements and sales and for execution of titles to purchasers of property at tax sales, and to pass all ordinances necessary to enforce the collection of taxes; *provided*, that such ordinances shall allow any person whose real property has been sold for taxes at least two years from the date of the collector's deed to redeem the same by paying double the amount paid for the same; *provided*, that the city shall not bid in any real property sold for taxes; *provided further*, that any such proceedings so perpetuated shall be received in evidence in any court when the title so conferred by the collector shall be called in question.

SEC. 44. That at any time after the day set for tax sales the city may institute suit for the amount of such taxes due on

such property as may not have been sold, and may foreclose the lien existing for such taxes and penalties that exist in favor of the city at the date of such sale, and the decree ordering such sale shall be so framed as to permit the redemption of said land as provided by the constitution of this State in article 8, section 13.

SEC. 45. That all property, real, personal or mixed, and all moneys and credits within the city, subject to taxation by the laws of the State, shall be subject to taxation by said city against the person who owned the same on the first day of January of each year for which a tax is levied.

SEC. 46. That the city council shall have power to levy and collect an annual occupation tax on all occupations, callings and professions taxed by the State from time to time, to the amount of one-half of the occupation tax levied by the
68 State, and shall have power to provide adequate means and penalties for enforcing collection of same.

SEC. 47. That the city council shall have the power to provide by ordinance for the assessing and levying of the taxes aforesaid, and to determine when taxes shall be paid.

SEC. 48. That no money shall be paid by the city upon any account whatever, to any person or corporation who is in arrears to the city for taxes due.

SEC. 49. That all assessments made upon property shall be a special lien thereon ; and all property, both real and personal, belonging to any delinquent tax payer, shall be liable to seizure and sale for the payment of the taxes due by such delinquent on said property, and such property may be sold for the payment of the taxes due by such delinquent on the same, and no attempt to collect such taxes shall in any way waive or invalidate such lien.

STREETS AND SEWERS.

SEC. 50. That the city council shall have the exclusive control and regulation of all streets, alleys, side-walks and highways within the corporate limits of the city, and shall have power: 1—to abate and remove encroachments thereon in

summary manner; 2—to put drains and sewers therein, and, when necessary, to appropriate private property for that purpose, to be condemned according to the laws relating to condemnation of property by railroad corporations, the city occupying the place of the railroad corporations in such cases; 3—to permit and regulate the laying of gas and water mains therein, and the erection of telegraph and telephone and electric light poles therein; 4—to regulate, establish and change the grade of all side walks, streets and alleys, and to require and compel the cutting down or filling up and raising of such streets, sidewalks and alleys; 5—to construct, regulate and keep in repair all culverts, sewers and crossings and to control and regulate the use of the same; 6—to construct, regulate and keep in repair all necessary sidewalks and foot ways and streets; 7—to grade, cut down and fill up the same; 8—to regulate the use of the same and abate and remove encroachments and obstructions thereon, and to compel the removal of same; *provided*, that whenever the city council has once established a grade for any street, sidewalk, alley
69 or park, and any owner of property abutting thereon has improved such property to conform to such grade, then the city council shall not have authority to change such grade, except by consent of a majority of the owners by feet frontage of the property in front of which it is proposed to change such established grade.

SEC. 51. That the city council shall fix and determine the nature and extent of all sidewalks, streets, drainage and sewerage improvements, and decide as to the kind of material to be used.

SEC. 52. That there may be appointed by the city council five citizens of Austin who shall constitute a board of street and sewer commissioners. They shall hold office until the next general election, and shall act gratuitously. The board shall be allowed, however, the sum of five hundred dollars annually or such portion of the same as they may require to cover expenses, if any, which they may incur in performing the duties of their office.

SEC. 53. That it shall be their duty to prepare and recom-

mend to the city council comprehensive plans for sidewalks, streets, sewers and drainage improvements, including the material to be used, and all other matters pertaining to the construction of the improvements.

SEC. 54. That all matters involving any outlay of as much as five hundred dollars pertaining to any improvement of the character above mentioned, shall first be referred to them, and an interval of not less than ten days after such reference is formally made by the city council, shall be allowed them in which to report upon the same to the said council; and it shall be their duty to examine, pass upon, and report to the city council all plans and specifications relating to such improvements, before the same are finally approved by the city council.

SEC. 55. That they shall also pass upon all bids received on matters relating to said improvements, and recommend such action in reference to the same to the city council as they may deem expedient. They shall also examine and pass upon all street work for the city where the contract exceeds five hundred dollars; and such work shall not be accepted by the city council, until their report on the same has been made to the city council, or until after the expiration of fifteen days from the time when the matter shall have been referred to them.

70 MISCELLANEOUS POWERS OF THE CITY COUNCIL.

SEC. 56. That the city council shall elect, on the nomination of the mayor or any alderman, all officers of the city except the Mayor, aldermen and board of school trustees. The election of said officers of the city to be elected by the city council, shall be at the first regular meeting or at any called meeting for that purpose after the general election of the Mayor, or at any time thereafter; *provided*, no election of officers by the council shall occur until after the time for filing contests for elections of aldermen, as provided for in this act, shall have expired, or until contests have been waived, as provided for in this act, and not until after the termination of any contest of election of aldermen.

SEC. 57. That the city council shall have power by ordinance:

1. To make regulations to prevent the introduction or spreading of any contagious disease within the city; to make quarantine ordinances for that purpose, and to enforce them within the city and within ten miles thereof, and to enforce vaccination, and to establish hospitals and make regulations for the government thereof within and without the city limits, and to make and enforce all other necessary regulations to secure the general health of its inhabitants.

2. To establish or erect, or cause to be established or erected, markets and market houses; to designate, regulate and control market places and privileges, and to inspect within or beyond the city limits, and determine the mode of inspecting cattle, meats, birds, fowl, fish, vegetables, fruit, milk, and to seize and destroy any decayed or unwholesome fruit or vegetables, any impure or unhealthy or unwholesome meats, birds, fowls, or fish, and to regulate, license, control or prevent the sale or keeping for sale on public streets, squares and alleys of any article of food or drink, or any goods, wares or merchandise of any kind whatever.

3. To define what shall be a nuisance in the city, and to punish the authors thereof by penalties, fines and imprisonment.

4. To do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.

5. To co-operate with the commissioner's court of Travis county in making such improvements connected with
71 the city and county as may be deemed by the city council and commissioners' court necessary to improve the public health and to promote efficient sanitary regulations; and by mutual agreement they may provide for the construction of such improvements, and the payment therefor.

6. To regulate the burial of the dead, and to prohibit public funerals in cases of death from contagious or infectious disease; to purchase, establish and regulate one or more cemeteries within or without the city limits; to regulate the

registration of marriages, births and deaths; to direct the returning and keeping of bills of mortality, and to impose penalties on physicians, ministers, sextons and others, for any default in the premises.

7. To provide for the erection of all needful buildings for the use of the city within its limits, and to determine when it is necessary to acquire property, or the use thereof, by the power of eminent domain, for all purposes for which the city may lawfully exercise such power.

8. To license and regulate auctioneers, grocers, merchants, retailers, hotels and boarding houses and bakeries, and to license and regulate or suppress ordinaries, hawkers, peddlers, brokers, pawn brokers and money changers.

9. To license and regulate hacks, carriages, omnibuses, wagons, carts and drays, and fix the rate to be charged for carriage of persons and for wagonage, cartage and drayage of property.

10. To license and regulate theatrical and other exhibitions, shows and amusements.

11. To license and regulate billiard tables, restaurants, drinking houses or saloons, and all places or establishments where intoxicating or fermented liquors are sold, and to regulate their location, and to restrain and suppress street beggars, disorderly houses, lotteries and all fraudulent devices and practices.

12. To suppress gaming and gambling of all kinds and descriptions, and to prevent the same.

13. To prohibit bawdy houses, houses of prostitution and assignation houses, and to punish prostitutes and keepers of houses of prostitution within the city.

72 14. To provide for the prevention and extinguishment of fires, and to organize and establish fire companies, also to regulate, restrain and prohibit the erection and repair and maintenance of wooden buildings in any part of the city, and to declare all wooden buildings which they may deem dangerous on account of fire, nuisances, and to require the same to be removed in such manner as the council may direct.

15. To regulate and prevent the carrying on of manufactories dangerous in causing or producing fires; to appoint fire wardens and property guards, with power to remove and keep away from the vicinity of any fire any suspicious persons lurking near the same, and to compel any person or persons present to aid in extinguishing the fire, or in the preservation of property exposed to the same, and to prevent goods from being purloined thereat, and with such other powers and duties as may be prescribed by ordinance.

16. To compel the owners of houses and other buildings to have scuttles upon the roof of any such buildings or houses, and stairs and ladders leading to the same.

17. To create a board of fire commissioners.

18. To regulate and describe the manner of building partition and parapet walls and of partition fences.

19. To establish standard weights and measures, and to regulate the weights and measures to be used in the city in all cases not otherwise provided for by law.

20. To provide for the inspection of lumber, the measurement thereof, and other building materials.

21. To provide for the inspection and weight of hay, the measure of charcoal and other fuel to be used in the city.

22. To regulate and prescribe the duties and powers and compensation of all officers and employees of the city, in accordance with the limitations of this charter, and to require bonds from them.

23. To create such offices and employ such agents as they may deem necessary for the good government and interest of the city, and to change or prescribe additional duties of all such officers and agents; *provided*, that the compensation of officers and employees shall not be increased nor diminished during their term of office.

73 24. To provide for the taking of an enumeration of the inhabitants of the city.

25. To provide for the removal from office of any person holding an office created by this act, or by ordinance, not otherwise provided for.

26. To fix the compensation and regulate the fees of all

jurors and witnesses, to impose fines, forfeitures and penalties for the breach of any ordinance, and to provide for the recovery and appropriating of such fines and forfeitures, and the enforcement of such penalties; *provided*, that no penalty shall exceed a fine of two hundred dollars and imprisonment not exceeding fifteen days for any one offense.

27. To erect a work-house and prisons and a house of correction, and to provide for the regulation and government thereof.

28. To regulate and license all ferries and toll bridges within the limits of the city, except that portion of the Colorado river above the point where the northern boundary corporate line of the city calling to run westwardly, would intersect the Colorado river, if prolonged westwardly, nor shall any ordinance be enforced prohibiting hunting or fishing on said portion of the river.

29. To prevent and restrain any riot, disturbance or disorderly assembly in any street, house or place in the city.

30. To use, regulate, improve, grade and control all grounds owned by the city within its limits.

31. To regulate the size, number and manner of construction of doors and stairways of theatres, tenement houses, audience rooms, public halls, and all buildings used for the gathering of large numbers of people, whether now built or hereafter to be built, so that they may be convenient, safe and speedy exits in case of fire.

32. To require the construction of suitable fire escapes on or in hotels, lodging houses, factories and other buildings, whether now or hereafter to be built.

33. To authorize one or more officers, agents or employees of the city to enter into and open all buildings and premises for the purpose of examining and discovering whether or not the same are dangerous on account of fire, or in an unclean state, and cause the defect to be remedied and filth and trash to be removed; and, generally the council shall have the power to establish such regulations for the prevention and extinguishment of fires as it may deem expedient.

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34. To prevent, prohibit and suppress horse racing, immoderate riding or driving in the streets; to prohibit and punish abuse of and cruelty to animals of every kind; to compel persons to fasten their horses or animals attached to vehicles or otherwise, while standing or remaining in the streets or other public places.

35. To prohibit the rolling of hoops, flying of kites, firing of fire-crackers, or fire works of any kind, or any other amusement having a tendency to annoy persons passing in the streets or on the side walks; to restrain and prohibit the ringing of bells, the blowing of horns, whistles or bugles, the crying of goods, and all other noises, practises and performances tending to collect persons in the streets or sidewalks by auctioneers and others for the purpose of business or otherwise.

36. To prevent all boxing matches, sparring exhibitions, cock fighting and dog fighting, and punish all persons making such exhibitions.

37. To regulate and prevent drumming on the streets or sidewalks, railroad platforms or other public places.

38. To require the owners of private drains, sinks and privies to fill up, clean, drain, relay, alter, repair, fix and improve the same as they may be ordered by resolution or ordinance so as to prevent the same being or becoming nuisances, and to impose penalties on persons not doing the same; and if there be no person in this city upon whom such order can be served, the city can have the work done, and the cost of the same shall be a lien on the property, taxed up against and collected in such manner as the city council may direct.

39. To build, own and operate street railroads, within and beyond the city limits.

40. To preserve order and prevent noise and confusion in and about the several depots on the arrival and departure of trains, and to make and regulate stands for vehicles at said depots and other public places.

41. To prohibit and regulate the driving of cattle or other animals through the streets of the city.

42. To inspect the construction of all buildings in said city, and to compel the connection of all buildings with

sewers when such buildings are in a sewerage district where sewers are in operation.

43. To regulate and locate the erection of all poles in the city, and cause the same to be changed, whether telegraph, telephone, electric light or otherwise.

44. To regulate the speed of locomotives, engines and other cars and vehicles in the city.

45. To direct and control the laying of railroad tracks, turnouts and switches, and require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets, and to require that they be kept in repair.

46. To erect, construct, build and operate a water and electric light system to supply the city and its inhabitants with water and electric light by constructing and maintaining a reservoir of water in and about the channel of the Colorado river, within and without the city limits, by erecting a dam across the same where such dam is now being constructed, to serve as a reservoir and to furnish power to operate an electric light system, and to build such other reservoir as may be necessary at such an elevated point within or without the limits of the city as may be necessary to supply the higher portions of the city with water. That for the purpose of constructing such water and light system the city shall have the power to take, hold and acquire such property within or without the limits of the city as may be necessary for the city to obtain in order to build such system, or any part thereof; but no property shall be taken, overflowed with water or otherwise damaged, by the city, within or without the limits for such purpose, without the consent of the owner thereof, except by due process of law, and upon making adequate compensation for the property so taken or damaged or over flowed. When the owner of property which shall be overflowed or damaged by the construction of such system of water and light works, or which it may be necessary for the city to acquire, cannot agree with the city as to the amount to be paid for injury to property or for over flowing the same, or the price which the city should pay to acquire such

property, the city may condemn such property as it may be necessary for it to acquire for such purposes, and have the damages assessed which the city should pay for injury to property to be over flowed by water or otherwise injured, in the
76 manner that railroad corporations are now or may from time to time be authorized to condemn property, and may in like manner have the damages to be paid for the property injured or overflowed assessed and established; the city occupying the place of the railroad corporation in such proceedings.

47. To regulate the use of locomotive engines; and to direct and control the location of cables and all other railroad tracks, and all steam railroad tracks, and to require railroad companies of all kinds to construct, at their own expense, such bridges, turnouts, culverts and crossings as the city council may deem necessary.

48. To regulate the speed of railroad trains in the city limits, and their stops at the street crossings, and require said companies to keep the streets through which they run in repair.

49. To regulate the running of horse railroad cars, or cars propelled by dummy engines, or other power, and laying down tracks for the same, the transportation of passengers thereon, the form of rails to be used.

50. To establish and regulate public pounds, and to regulate and prohibit the running at large of horses, mules, sheep, swine, goats, geese, dogs and other animals, and to authorize the distraining, impounding and sale of the same for the costs of the proceedings and the penalty incurred, and to order their destruction when they cannot be sold, and to impose penalties on the owners or harborers thereof for violation of any ordinance.

51. To provide for the holding of election by the people, and to regulate the manner of holding the same; and every male inhabitant in the city qualified to vote for State and County officers in Travis County who shall have resided six months in the limits of the city, shall be qualified to vote for city officers under this act.

City Officers.

The Mayor.

Sec. 58. That there shall be a Mayor of said city, shall be elected by the voters of the city on the first Monday in December, 1891, and on the first Monday in December every two years thereafter, and who shall hold his office for the term of two years from the time of his election and until his
77 successor shall have been elected and qualified. The Mayor shall be the chief executive officer of the city. The Mayor shall receive no salary or fees, except the sum of six hundred dollars per annum, payable monthly, which shall be allowed him for the reimbursement of the expenses incident to or growing out of his position.

Sec. 59. That no person shall be Mayor who at the time of his election is not possessed of the qualifications required for an alderman, or who holds any lucrative office under the authority of the United States or any State; he shall before entering upon the duties of his office, take the oath prescribed by the constitution of the State, and to faithfully and impartially perform his duties.

Sec. 60. That when two or more persons shall have an equal number of votes for the office of Mayor, a new election shall be ordered, except when the election is contested, and whenever an election for Mayor is contested, the city council shall determine the same.

Sec. 61. That whenever any vacancy shall happen in the office of Mayor within three months of the time of holding a general election in the office of Mayor, it shall be filled by election by the city council, of some person not a member of the council, in which case such Mayor shall hold office for the unexpired term of office only. Vacancies in the office of Mayor occurring more than three months before a general election, shall be filled by a special election by the qualified voters of the city.

Sec. 62. That the Mayor or any other officer of the city may be removed from office for any malfeasance in office, by a majority of two-thirds of the full board of aldermen, after

trial and conviction. The council shall be the judge of what shall constitute malfeasance in office.

SEC. 63. That the Mayor shall sign the commissions and appointments of all persons elected by the city council.

SEC. 64. That the Mayor shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty, and he may suspend, and by and with the consent of two-thirds of the whole board of aldermen, remove from office any person holding office made elective by the city council by this act, or hereafter created by ordinance. He shall have power, when he deems it necessary, to require any officer of the city to exhibit his accounts or other papers; it shall be his duty to make report to the council, in writing, regarding any error or deficiency he may discover in said accounts
78 and papers.

SEC. 65. That the Mayor shall preside at all meetings of the city council, except as herein otherwise provided, and shall have a casting vote when the council is equally divided, and not otherwise.

SEC. 66. That the Mayor shall from time to time communicate to the city council information, and recommend such measures as in his opinion may tend to the improvement of the finances, health, security, ornament and general prosperity of the city.

SEC. 67. That the Mayor shall take care that the laws of the State and the ordinances of the city are duly enforced respected and observed within the city, and he is hereby authorized to call on every male inhabitant of the city over eighteen years of age and under the age of fifty years to aid in enforcing the laws and ordinances of the city, and any person who shall not obey such call, shall forfeit to the city a fine not exceeding two hundred dollars.

SEC. 68. That the Mayor, by and with the consent of the council, shall have power to remit fines and forfeitures, and to grant reprieves and pardons for all offenses arising under the ordinances of the city.

SEC. 69. That the Mayor shall have power to solemnize marriages, and to administer oaths of office.

SEC. 70. That in case of the temporary absence or illness of the recorder, or in case of vacancy of the office of Recorder, the Mayor shall be *ex-officio* Recorder, to try all cases of violation of the city ordinances, and it shall be his duty to do so, unless such vacancy, temporary or otherwise, shall have been filled as provided in this act.

OTHER OFFICERS.

SEC. 71. That there shall be a City Marshal, a City Clerk, a City Attorney, a City Assessor and Collector, a City Physician, a Treasurer, a Recorder, a City Engineer, a Superintendent of Streets, and such other officers, agents and employees of the city as may be now or hereafter provided for by the city council by ordinance. The terms of the officers mentioned in this act shall be for two years from the first Monday in December of the year of their election. They shall be elected by the city council, as soon as may be after the first Monday in December, every two years. They shall hold their offices until their respective successors are elected
79 and qualified.

City Marshall.

SEC. 72. That the Marshal of the City shall be *ex-officio* chief of Police, and he shall either in person or by deputy attend upon the recorders court while in session, and upon meetings of the city council, and shall promptly and faithfully execute all writs and process issued to him. He shall have like power with the sheriff of the County to execute the writ of search warrant. He shall be active in quieting riots, disorders and disturbances of the peace within the limits of the city, and shall take into custody all persons so offending against the peace of the city, and shall have authority to take suitable and sufficient bail for the appearance before the Recorder's court of any person charged with an offense against ordinances or laws of the city. It shall be his duty to arrest without warrant, all violators of the public peace, and all who obstruct or interfere with him in the execution of the duties

of his office, or who shall be guilty of any disorderly conduct or disturbance whatever in his presence, or upon complaint of any citizen. To prevent a breach of the peace or preserve quiet and good order, he shall have authority to close any theatre, barroom, drink house, or any other place or building of public resort, and in the prosecution and suppression of crime and arrest of offenders he shall have, possess and exercise like power, authority and jurisdiction, as the sheriff of the county under the laws of the State. He shall receive a salary of fifteen hundred dollars per annum, payable in monthly installments. He shall give a bond, payable to the said city, with good security, conditioned for the faithful performance of his duties in accordance with the charter and ordinances of the city, and in such amount as the city council may require, said bond to be approved by the city council. He shall perform such other duties and possess such other powers, rights and authority as the council may by ordinance require and confer.

City Clerk.

SEC. 73. That it shall be the duty of the city clerk to attend all meetings of the city council, and to keep accurate minutes of the proceedings thereof in a book to be provided for that purpose, to preserve and keep in order, all books, papers, documents, records and files of said council, to countersign all commissions and licenses issued by the Mayor, and to keep a record of them, and to draw all warrants on the Treasurer, and countersign the same, and to keep accurate accounts thereof in a book provided for that purpose.

SEC. 74. That he shall have the custody of all ordinances of said city, and of all seals of the corporation, and shall only affix the same to the obligations of the city by order of the proper authorities of the city.

SEC. 75. That the City Clerk shall perform such other and further duties as may be required of him by the council by resolutions, ordinances or otherwise, and give such bond as the city council may prescribe.

SEC. 76. That he shall receive an annual salary of fifteen hundred dollars, payable monthly.

SEC. 77. That the City Attorney shall be a regularly licensed lawyer, who shall have received his license to practice law in this State more than five years before his election. He shall attend to all cases in any court in this State wherein the city may be a party in interest, unless the council otherwise provides. He shall draw all ordinances when requested to do so by the Mayor or any alderman, and inspect and advise upon all papers and documents involving any interest of the city. He shall be the legal adviser of the Mayor, the city council, or any committee or board of the city, and of all city officers and authorities upon legal questions touching their official duties.

SEC. 78. That the City Attorney shall receive an annual salary of fifteen hundred dollars, payable monthly, and shall receive such fees as the council may allow, and shall perform such duties as the council may direct. He may employ an assistant at a salary of not exceeding five hundred dollars per annum, to represent him in the Recorders Court and elsewhere.

The City Engineer.

SEC. 79. That the City Engineer shall inspect and pass upon the construction of all the public works ordered by the city council, and make out plans, specifications and estimates therefor; he shall do the surveying and engineering
81 ordered by the city council; he shall preserve all plans, maps, notes, surveys, books, papers and documents, and other things pertaining to his office, made by him, or in his charge, and deliver the same to his successor in office.

SEC. 80. That the City Engineer shall have such power, and perform such other duties as may be prescribed by the council by resolutions, ordinances or otherwise.

SEC. 81. That he shall receive as compensation the sum of twelve hundred dollars per annum, payable monthly, and is prohibited from receiving a fee from any private person for giving the grade and lines of streets, alleys, sidewalks and locations, and grades and sewers.

City Assessor and Collector.

SEC. 82. That the City Assessor and Collector shall assess and collect the city taxes and occupation licenses, and shall pay the same over to the City Treasurer promptly as collected, taking duplicate receipts therefor, one of which he shall retain and the other he shall return to the city council. He shall, monthly, or oftener, if required, make a detailed report to the city council of all collections made by him.

SEC. 83. That he shall be vigilant and see that no business is carried on without the license or occupation tax due therefor shall have first been paid. He shall be responsible for all acts of his deputies; he shall be vigilant in collecting all delinquent taxes, and enforce their collection as herein provided, and as may be provided by ordinance. He shall give bond in such amounts and in such form as the council may prescribe, with good and sufficient securities.

SEC. 84. That the council may require a new bond if in their opinion the existing bond is insufficient, and whenever such bond is required, he shall perform no official act until such bond shall have been approved.

SEC. 85. That he shall receive as compensation the sum of eighteen hundred dollars a year, payable monthly, exclusive of the salaries of assistants and deputies.

SEC. 86. That he shall have all the powers and perform all the duties herein provided, and such others as the council may confer and prescribe.

Treasurer.

SEC. 87. That the City Treasurer shall give such bond
82 or bonds as may be required, conditioned for the faithful discharge of his duties. He shall receive and keep all money belonging to the city, and make all payments of the same upon warrants of the Mayor, assisted by the City Clerk.

SEC. 88. That he shall render a full and correct statement of his receipts and payments to the city council at their first regular meeting in every month, and at such other times as the council may require. He shall perform such other acts and

duties as the council may require, and receive an annual salary of six hundred dollars, payable monthly.

The Recorder.

SEC. 89. That the Recorder shall be the Chief Judicial magistrate of the city, and as such, shall hold a court within said city by the name of Recorder's court of the City of Austin, which said court shall have jurisdiction and cognizance of all misdemeanors, breaches of the peace, infractions of the ordinances, and all other charges arising under the ordinances of the city, subject, however, to an appeal to the county court in the same manner as appeals are taken and granted from justice's courts to the county court under the general laws of the State.

SEC. 90. That the recorder may require of any person arrested under this act, or the ordinances of the city, a bond to keep the peace, with two good and sufficient securities, which bond shall be payable to the city of Austin. He shall have full power and authority to issue subpœnas for witnesses and compel their attendance by process of attachment. He may issue warrants of arrest, search warrants, executions and other process known to law that justices of the peace of this State may lawfully issue, and he may punish all contempt by fines and imprisonment or both.

SEC. 91. That he shall have full power to administer official oaths and all other oaths or affirmations, and give certificates thereof. The Recorder shall be *ex-officio* Justice of the Peace, and shall possess and exercise within the city limits in criminal cases in all the powers and duties of such officers, but in no case shall he entertain jurisdiction in civil suits.

SEC. 92. That the Recorder shall be conservator of
83 the peace, and his court shall be open every day except Sunday and legal holidays, to hear and determine any and all cases cognizable before him, and shall have power to bring parties before him forthwith for trial. Parties arraigned for violation of city ordinances, demanding a trial by jury, shall deposit with the court the sum of three dollars security

for the payment of the cost of such jury, unless they shall make oath that they are unable to pay or secure the same; any person convicted of an offense under the provisions of this act, or the ordinances of the city, shall be punished as may be prescribed by ordinance, not to exceed the punishment which the legislature may lawfully authorize a Recorder of a city to impose.

SEC. 93. That the Recorder shall perform such other duties as may be prescribed by any ordinance of the city, and shall receive a salary of not exceeding fifteen hundred dollars.

SEC. 94. That the Recorder shall be a licensed lawyer, and competent to discharge the duties required of him by the charter and ordinances of the city.

SEC. 95. That the fines imposed in the Recorder's Court for violation of the city ordinances shall not be less than five dollars, nor more than two hundred dollars for each and every offense, and no cost shall be taxed against any person convicted therein.

STREET SUPERINTENDENT.

SEC. 96. That there shall be a Superintendent of Streets elected by the City Council at the time other officers are elected. He shall hold his office for the term of two years and until his successor has been elected and qualified; *provided*, that the present street commissioner shall be Superintendent of Streets until the next general election.

SEC. 97. That he shall receive a salary of not exceeding fifteen hundred dollars per annum, payable monthly.

SEC. 98. That the Superintendent in the absence of direction from the board of street commissioners, or from the council or city engineer, shall, with the advice of the Mayor, have general supervision of all work on the streets and bridges of the city within such limit of expense as
84 the council may prescribe.

SEC. 99. That he shall perform such other duties as the city council may, from time to time prescribe.

GENERAL PROVISIONS.

SEC. 100. That the city council shall have power, subject to the restriction herein contained, to make all ordinances which

shall be necessary and proper for carrying into effect the powers specified herein; *provided*, that the council shall have no power to prohibit the owners of property abutting on the Colorado river from fishing in the river and resorting thereto for water, and having access thereto for themselves and stock.

SEC. 101. That all ordinances of the City of Austin and rules and regulations of the city council and other departments of the city which shall be in force when this act takes effect, and which are not in conflict with the same, shall remain in full force and effect until amended, altered or repealed by the city council.

SEC. 102. That all members of the council and other officers of the city shall continue in office until the expiration of the time for which they were elected, respectively, and until their successors are elected and qualified.

SEC. 103. That the fiscal year of the city shall be from and including the first Tuesday in December in each year, to and including the first Monday in December of the next succeeding year; and all receipts of money during such fiscal year shall be regarded as funds belonging to such year, whether collected from the taxes or other dues of a previous year or not, and all taxes and other dues, remaining due and uncollected at the expiration of one fiscal year, shall be regarded as resources of the next succeeding fiscal year.

SEC. 104. That the receipts of money during any fiscal year other than from special funds provided to pay interest and sinking funds on bonds of the city, shall be applied to the payment of expenses and indebtedness incurred during such fiscal year; and no debt, other than such as may be authorized by a vote of tax payers as is provided for in this act, shall be incurred, to be paid after the end of the fiscal year in which it may be incurred.

SEC. 105. That no contract shall be made involving
85 the payment of money by the city after the termination of the fiscal year in which it is made, except for constructing public works or other improvements, which, in the judgment of the council, cannot be practically completed before the end of the fiscal year; but no contract made for such public works

or improvements shall in any event involve the payment of a greater sum, after the close of the fiscal year in which such contract is made, than may be paid out of the fund belonging to such fiscal year, and in all such cases an appropriation shall be made out of the funds for the pending fiscal year for the payment of the amount the city will become liable for if such contract is performed; such appropriation shall be made at the time such contract shall be executed, or the contract shall not be valid; *provided*, that this section shall not apply to the expenditure of any special funds raised by the issuance of bonds for special purposes.

SEC. 106. That in order to make these restrictions effective, the council shall, within two months after the beginning of each fiscal year, and after the salaries of officers and regular employees shall have been fixed for the year, cause to be made or adopt an estimate of the probable income from all sources which will be collected for the general fund during the fiscal year, and of the expenditures to pay salaries and wages of officers and regular employees, and of the amount required to meet the other ordinary expenses of the city government, not including work on streets and bridges or other public improvements, said estimates shall be spread upon the minutes of the council when adopted, and may be amended when the council may deem them incorrect.

SEC. 107. That after the adoption of the said estimates it shall be unlawful for the city council to so appropriate sums out of the general funds as to reduce the general fund below the amount which, if said estimate be taken as correct, will pay the said estimated expenses of the city government for the pending fiscal year.

SEC. 108. That after two months from the beginning of any fiscal year no appropriation shall be made for any purpose other than to pay the regular salaries of officers and employees, and expenses of the hospital, without such estimate of the council being in force, as provided for in this act.

SEC. 109. That the city Clerk shall keep posted in a
86 conspicuous place in the council room, a copy of the estimates provided for in the preceding sections, and shall note in connection therewith the aggregate of each appropri-

ation ordinance affecting the general funds, passed by the council, after the same takes effect.

SEC. 110. That unexpended balances of appropriations remaining after the purposes for which they were made, have been accomplished or abandoned, shall be reported to the City Clerk by the committee or officers of the city having the subject in charge, and when so reported, such unexpended balances of appropriations shall be noted in connection with said estimates so posted in the council room.

SEC. 111. That no money shall be paid out of the city treasury except by warrant, signed by the Mayor and attested by the City Clerk.

SEC. 112. That the city council shall cause to be published, within a month after the end of each fiscal year, a full, complete and detailed statement of all moneys received and expended, classifying each receipt and expenditure under its proper head.

SEC. 113. That the inhabitants of the city of Austin are hereby exempted from working on public roads beyond the limits of the city.

SEC. 114. That this act is declared a public act and may be read in evidence in all courts of law and equity in this State without proof.

SEC. 115. That the ordinances, resolutions and by-laws of the city council may be proved *prima facie* by a book of printed ordinances of the city appearing to be printed by the authority of the city, or by copies of ordinances certified by the City Clerk to be true copies of such ordinances or the record thereof.

SEC. 116. That the city of Austin may institute and prosecute suits without giving security for costs, and may appeal from judgments without giving *supersedeas* or cost bonds.

SEC. 117. That this act shall not be construed to effect in any manner the general laws governing the levying of taxes for public schools in cities, or to affect the action taken or *status* required by the city of Austin thereunder, or the title to school property, the control of school funds and money,

or the election of the board of school trustees as now established, or to affect the continuation in office of the
87 present school trustees of the city of Austin, and the election of a board of school trustees shall be as heretofore in said city, and their powers and duties shall remain as under the existing laws.

SEC. 118. Nothing herein contained shall ever be construed to in any manner suspend, modify or abridge any penal laws of this State, but the penal laws of this State shall ever be in full force and effect, and in no manner repealed or suspended by any provision of this act, but the council may enact any ordinance not in conflict with the penal laws of this State.

SEC. 119. That the additional territory added to the city of Austin and not heretofore embraced within the corporate limits of Austin shall not be charged with or liable for any debts of the city of Austin incurred prior to the first day of May, A. D. 1890.

SEC. 120. That the jurisdiction and powers conferred on the city of Austin by this act shall supersede the authority of each and all other municipal corporations heretofore exercising any authority over any part of the territory included within the boundaries of the city of Austin as prescribed by this Act.

SEC. 121. That the fact that Austin without this act has not sufficient power of eminent domain to enable her to progress with her important water and light system now in progress of construction without speedy grant of which power she is in danger of suffering great loss from delay, creates an imperative public necessity and emergency authorizing the suspension of the constitutional rule, requiring bills to be read on three several days and requiring that this act take effect and be in force from and after its passage, and it is so enacted.

R. T. MILNER,
Speaker of the House of Representatives.

GEO. C. PENNLETON,
President of the Senate.

I hereby certify that the within named H. B. No. 636 originated in the House and passed the same by a two-thirds vote, ayes 78, noes 1, April 1st, 1891.

GEO. W. FINGER,
Acting Chief Clerk, House of Representatives.

88 I hereby certify that the within named H. B. No. 636 passed the Senate by a two-thirds vote, ayes 24, noes 0, April 3rd, 1891.

A. M. KENNEDY,
Secretary of the Senate.

Received in the Executive Office this 3rd day of April, A. D. 1891, at six o'clock.

R. B. LEVY,
Private Secretary.

Received at the Department of State at 2.15 o'clock P. M., April 16th, A. D. 1891.

G. W. SMITH,
Secretary of State.

(NOTE:—The foregoing act was presented to the Governor of Texas for his approval on the third day of April, A. D. 1891, and was not signed by him, nor returned to the House in which it originated, with his objections thereto; nor were any objections thereto filed by him in this office after adjournment of the Legislature within the time prescribed by the constitution. This act thereupon became a law without his signature.

GEO. W. SMITH,
Secretary of State.)

THE STATE OF TEXAS,
DEPARTMENT OF STATE.

I, Geo. W. Smith, Secretary of State of the State of Texas, do hereby certify that the foregoing ninety pages, from one to ninety both inclusive, written only on one side of the paper, is a true and correct copy of original enrolled H. B. No. 636, entitled: "An Act to incorporate the City of Austin, to grant it a new charter and to extend its boundaries," now on file in this department.

Witness my official signature and the seal of State affixed at the city of Austin, this 27th day of April, A. D. 1891.

GEO. W. SMITH,
[L. S.] *Secretary of State.*

(*Endorsement*). Exhibit K.—No. 207 Eq.—Filed Jan. 3, 1895, D. H. Hart, Clerk, By O. H. Millican, Deputy.

89 DEMURRER OF DEFENDANTS.

Filed February 4, 1895.

IN UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF TEXAS, AT AUSTIN.

The Penn Mutual Life Insurance Company et al.,
vs.
The City of Austin et al.
No. 207
In Equity.

The demurrer of the city of Austin, of John McDonald, Mayor of said City, and of W. C. Walsh, Frank Hamilton, S. K. Morley, A. P. Wooldridge, John W. Maddox, M. A. Taylor and John McDonald, constituting the board of public works of said city of Austin, being all of the defendants to the bill of complaint, save and except the Austin Water, Light & Power Company.

The defendants herein, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said Complainants' Bill to be true, in such manner and form as the same are therein set forth, demur thereto, and for causes of demurrer show that said complainants have not, in and by said bill, made or stated such a cause as does or ought to entitle them to any such relief as is therein sought and prayed for, from or against these defendants or any of them; that said bill is without equity whatsoever, the matters and things therein complained of, if entitling complainants to relief of any kind, being cognizable in a court of law and not in a court of equity—the said bill being wholly without equity. And these defendants say and each of them says that said bill is insufficient for the following, among other reasons:

First.—Because the contract set out in complainant's bill is and ever has been void under the Constitution and laws of

the State of Texas, the city of Austin having no power, under its charter or under the Constitution and laws of the State of Texas, to enter into such contract.

Second.—Because the city of Austin, at the time of making of the alleged contract, had and now has express authority and power under its charter and acts of incorporation to construct, build, maintain and operate a system of water and light works, and said right on the part of the City has been
90 expressly adjudicated and determined by the Supreme Court of said State.

Third.—Because the city of Austin has not now and, under the Constitution and laws of the State of Texas, did not have at the date of the alleged contract, any power to exempt the property of the City Water Company or the Austin Water, Light and Power Company, or any part thereof from taxation, or commute taxes levied thereon, and the attempt so to do in said contract is and was void, and said city is now and was at the time of the alleged levy of said tax under obligation and required by the Constitution and laws of said State and the charter of said City to impose taxes upon all alike, and it is not within the power of this or other court to exempt said property from taxation by enjoining the levy of tax thereon, the Constitution and laws requiring that the taxation shall be uniform.

Fourth.—Because even if said contract and the charter of the City Water Company and the Austin Water, Light and Power Company had in express terms sought to grant to or confer upon the City Water Company or the Austin Water, Light and Power Company the exclusive right to furnish the City of Austin and the inhabitants thereof with water and light, or either, for public and private use, still, under the Constitution and laws of Texas now in force and in force at the time of the making of said alleged contract and the granting of said charters, such exclusive privilege would have been subject to alteration, amendment or repeal by the Legislature.

Fifth.—Because, prior to the making of said contract, the Constitution of the State of Texas, adopted in 1876, in express terms provided that no irrevocable or uncontrollable grant or special privileges or immunities should be made, and that all privileges and franchises granted by the Legislature or created by its authority should be subject to the control thereof, and these defendants say that, under and by virtue of an act of the Legislature of the State of Texas granting to the City of Austin a new charter, which is designated as Exhibit K in complainants' bill, express power and authority was granted to the City of Austin to issue bonds for the purpose of establishing and maintaining the system of water and light works now in course of construction by said City.

Sixth.—Because, if complainants have the right to
91 sue for any alleged breach of said contract, that such suit is not cognizable by and in a court of equity, and that a plain, full and adequate remedy at law exists for any breach of the provisions of said contract which may result in damage to the complainant, and that said contract, if valid, in express terms furnishes the measure of damage for any breach of the provisions thereof. For defendants say that, under the charter of said City, authority is given to annually assess and collect a tax of one per cent. *ad valorem* on all property situated within said City for the purpose of paying for the current expenses and general improvement of the said City or its property, and that such tax would be ample to meet and fully discharge any claim that complainants or said company might establish against said City as damages for the breach of said contract.

Seventh.—Because there is nothing in said contract requiring the City of Austin to purchase the property and works of the City Water Company or the Austin Water, Light and Power Company.

Wherefore, for the several grounds of demurrer herein before stated, these defendants demand judgment of this Honor-

able Court whether they shall be compelled to make any further or other answer to said bill or any matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

D. W. DOOM,
FISHER & TOWNES,
R. H. WARD,
and GEO. F. PENDEXTER,
Solicitors and Counsel for all the Defendants except the Austin Water, Light and Power Company.

We hereby certify that the foregoing demurrer is in our opinion well founded in point of law.

D. W. DOOM,
FISHER & TOWNES,
R. H. WARD,
and GEO. F. PENDEXTER,
Solicitors and Counsel for all the Defendants except the Austin Water, Light and Power Company.

STATE OF TEXAS, }
COUNTY OF TRAVIS. }

John McDonald being duly sworn, deposes and says: I am one of the above named defendants. The foregoing demurrer is not interposed for delay.

JOHN McDONALD.

92 Sworn to and subscribed before me this 4th day of February, A. D. 1895.

D. H. HART,
U. S. Commissioner, W. Dist. Texas.

(*Endorsement*). No. 207 in Equity.—The Penn Mutual Life Ins. Co. *et al. vs.* The City of Austin *et al.*—Demurrer of all of the Defendants except the Austin Water, Light and Power Co.—Filed Feb. 4, 1895, D. H. Hart, Clerk.

JUDGMENT OF THE COURT DISMISSING BILL.

Entered March 8, 1895.

AUSTIN, TEXAS, March 8th, 1895.

Penn Mutual Life Insurance Co. et al.
vs.
The City of Austin et al.
No. 207.
Equity.

IN THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF TEXAS, AT AUSTIN.

BE IT REMEMBERED, that on this day came on to be heard in open court, defendants demurrer to Complainants Bill of Complaint, and the same having been heard and considered by the Court, the Court is of the opinion that the bill is without Equity.

It is therefore ordered, adjudged and decreed that said demurrer be and the same is hereby sustained, and the bill dismissed.

To which action of the court the Complainants then and there in open court excepted, and prayed the allowance of an appeal, which was by the Court allowed, and the bond for appeal fixed at $500.00.

(Signed) A. P. McCORMICK,
Circuit Judge.

93 ## ASSIGNMENT OF ERRORS.

Filed April 8, 1895.

Penn Mutual Life Insurance Company et al.
vs.
The City of Austin et al.
No. 207.

And now come the Appellants and assign error in this court, and say:—

The Court erred in sustaining Defendants Demurrer to Complainants Bill of Complaint on the ground that the said

bill is without equity, and in dismissing said bill from the docket of the Court.

C. W. OGDEN,
Counsel for Appellant.

(*Endorsement*). No. 207, Eq.—Penn Mutual Life Insurance Co. *et al. vs.* City of Austin *et al.* Complainants Assignment of Error. Filed Apr. 8, 1895, D. H. Hart, Clerk, By O. H. Millican, Deputy.

BOND ON APPEAL.

Filed Mar. 23, 1895.

IN CIRCUIT COURT OF U. S. FOR THE WESTERN DISTRICT OF TEXAS, AT AUSTIN, IN THE FIFTH CIRCUIT.

The Penn Mutual Life Insurance Co. et al., *Appellant*,

vs.

The City of Austin et al., *Respondents.*

No. 207.

KNOW ALL MEN BY THESE PRESENTS, that we, The Penn Mutual Life Insurance Co., citizen of the State of Pennsylvania, Jacob Tome, citizen of the State of Maryland, Robert Goelet and Ogden Goelet, resident citizens of the State of New York, as principals, and Joseph Nalle and E. C. Bartholomew, citizens of the State of Texas, and County of
94 Travis as securities, are held and firmly bound unto the above-named the City of Austin, John McDonald, Mayor of said City of Austin, W. C. Walsh, Frank Hamilton, S. K. Morley, A. P. Wooldridge, Jno. W. Maddox, M. A. Taylor and Jno. McDonald, in the sum of Five Hundred Dollars, to be paid to the said City of Austin and the parties named Jno. McDonald, Mayor of said City of Austin, W. C. Walsh, Frank Hamilton, S. K. Morley, A. P. Wooldridge, Jno. W. Maddox, M. A. Taylor and Jno. McDonald, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, using scrawls therefor, and dated this the 23rd day of March, 1895.

WHEREAS, the above named, the Penn Mutual Life Insurance Company, Jacob Tome, Robt. Goelet and Ogden Goelet, have prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the Western District of Texas during the present term of said Court at Austin, Texas, on the 8th day of March, 1895.

Now therefore, the condition of this the above obligation is such that if the above named, the Penn Mutual Life Insurance Company, Jacob Tome, Robt. Goelet and Ogden Goelet shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE PENN MUTUAL LIFE INSURANCE COMPANY,
By
C. W. OGDEN,
Atty. of Record.

JACOB TOME,
By
C. W. OGDEN,
his atty. of Record.

ROBERT GOELET,
By
C. W. OGDEN,
his atty. of Record.

OGDEN GOELET,
By his atty. of record,
C. W. OGDEN.

JOSEPH NALLE,

E. C. BARTHOLOMEW,

Sealed and delivered and taken and acknowledged this the 23d day of March, 1895.

D. H. HART,
U. S. Commissioner.

95 Approved by

Circuit Judge.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF TEXAS.

STATE OF TEXAS,
COUNTY OF TRAVIS.

Personally appeared before me, D. H. Hart, Commissioner Circuit Court of United States, West. Dist. Texas, of said County and State, Joseph Nalle and E. C. Bartholomew, who being by me first duly sworn say that they are possessed of property to the amount of $1000.00, subject to execution over and above their liabilities under the laws of the State of Texas.

JOSEPH NALLE,
E. C. BARTHOLOMEW.

Subscribed and sworn to before me, this 23rd day of March, 1895.

D. H. HART,
U. S. Commissioner, W. Dist. Texas, at Austin, Texas.

(*Endorsement.*) No. 207.—The Penn Mutual Life Insurance Co. *et al. vs.* The City of Austin *et al.*—Bond on Appeal. Filed March 23rd, 1895. D. H. Hart, Clerk, By O. H. Millican, Deputy.

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96 THE UNITED STATES OF AMERICA,
WESTERN DISTRICT OF TEXAS.

I, D. H. Hart, Clerk of the Circuit Court of the United States for the Western District of Texas, in the Fifth Circuit, at Austin, Texas, do hereby certify that the above and foregoing ninety-six (96) pages contain a true and correct copy of the proceedings had in cause No. 207, Equity, entitled The Penn Mutual Life Insurance Company, Jacob Tome, Robert Goelet and Ogden Goelet, Complainants, *vs.* The City of Austin, John McDonald, Mayor of the City of Austin, and

W. C. Walsh, Frank Hamilton, S. K. Morley, A. P. Wooldridge, John W. Maddox, M. A. Taylor and John McDonald, composing the Board of Public Works of the City of Austin, and the Austin Water, Light and Power Company, Respondents, as the same appears from the files and records of said Court now in my custody.

Witness my hand and the seal of the Circuit Court, at office in the City of Austin, this the 9th day of April, A. D. 1895.

D. H. HART,
Clerk.

[SEAL]

By

O. H. MILLICAN,
Deputy.

No. 885, 44.

Court of Claims, Nov. 16

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Nov. 29, 1897.

SUPREME COURT, U. S.
FILED
NOV 29 1897
JAMES H. MCKENNEY,

THE PENN MUTUAL LIFE INSURANCE COMPANY, JACOB H. TOME, ROBERT SOELET and GOUEN SOELET, Appellants,

versus

THE CITY OF AUSTIN; JOHN McDONALD, Mayor of the City of Austin; WILLIAM C. WALSH, FRANK HAMILTON, S. K. MORLEY, A. P. WOOLDRIDGE, JOHN W. HARRIS, M. A. TAYLOR and JOHN McDONALD, Composing the Board of Public Works of the City of Austin; and the AUSTIN WATER, LIGHT & POWER COMPANY, Appellees.

Appeal from the Circuit Court of the United States for the Western District of Texas.

BRIEF OF APPELLANTS.

SKIPWITH WILMER,
SAMUEL B. HUEY,
D. T. WATSON,
Solicitors for Appellants.

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Supreme Court of the United States,

OCTOBER TERM, 1895. No. 636.

THE PENN MUTUAL LIFE INSURANCE COMPANY, JACOB TOME, ROBERT GOELET AND OGDEN GOELET, APPELLANTS,

versus

THE CITY OF AUSTIN, JOHN McDONALD, MAYOR OF THE CITY OF AUSTIN; WILLIAM C. WALSH, FRANK HAMILTON, S. K. MORELEY, A. P. WOOLDRIDGE, JOHN W. MADDOX, M. A. TAYLOR AND JOHN McDONALD, COMPOSING THE BOARD OF PUBLIC WORKS OF THE CITY OF AUSTIN; AND THE AUSTIN WATER, LIGHT AND POWER COMPANY, APPELLEES.

Appeal from the Circuit Court of the United States for the Western District of Texas.

HISTORY OF THE CASE.

This is an appeal from a decree of the Circuit Court of the United States for the Western District of Texas, dismissing the plaintiffs' bill on a demurrer, filed by the city of Austin and its Mayor and Board of Public Works. The facts of the case, as gleaned from the bill, are as follows:

In 1882 the city of Austin, the capital of the State of Texas, had a population of 10,000, but no adequate water supply for either public or private use, for the extinguish-

ment of fires, nor had it the money, or the credit upon which it could borrow the money, required for the erection of the necessary works to secure such supply.

To erect adequate works of its own would have required such a rate of taxation as to practically exhaust the taxing power of the city, and so heavily burden the tax-payer that the ability of the city to carry on its ordinary government and other needed public improvements would have been seriously impaired. The best, if not the only, means then available to provide the city and inhabitants with a sufficient water supply was by securing the construction of such works by private enterprise. It was impossible to do this except with the assurance that the cost of the erection would be repaid with a reasonable return for the investment.

Both the city and its inhabitants realizing the situation, the City Water Company was induced to erect such works and supply the city and inhabitants with water.

The charter of the city of Austin, approved April 5th, 1873, provided that the Mayor and City Council should have the power

> "To construct water works and gas works, within or beyond the city limits, or both; to provide the city with water and gas, to erect hydrants, fire-plugs and pumps in the streets, * * * to provide for the prevention and extinguishment of fires and organizing fire companies."

By the general laws of Texas it was provided that:

> "The municipal authorities of any city, town or village in which any gas-light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting and supplying with water the streets, alleys, lots, squares and public places in any such city, town or village."

The free incorporation of water companies for "the supply of water to the public" was authorized by general statute,

and when incorporated such companies were authorized as as follows (Article 629, Revised Statutes):

> "Any gas or water corporation shall have full power to manufacture and sell, and to furnish such quantities of water or gas as may be required by the city town or village where located for public or private buildings, or for other purposes, and such corporation shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, alleys, lanes and squares in such city, town or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe."

With these laws in force, the Mayor and City Council of Austin, upon the petition of a large number of citizens and tax-payers, passed an ordinance, approved April 13th, 1882, consenting to the City Water Company, a corporation of the State, laying its pipes in the streets, and supplying the city with water at a fixed rate (R., p. 41), and instructing the Mayor to contract with the water company to supply water for use in the streets and public hydrants and fountains, and for the extinguishment of fires by the Holly system of pumps. Part of the water so to be furnished to the city was to be paid for by a fixed hydrant rental, and part was to be furnished as an equivalent for the municipal taxes on the water company's property. The water company was to extend its mains whenever and wherever directed by the city authorities.

This ordinance recited in the preamble that it was passed:

> "In accordance with the powers granted in the charter of the city, and for the purpose of more effectually protecting the city from fire, and to secure the citizens with a supply of water suitable for domestic purposes, and for other benefits to the city."

To meet the interest on any bonds which might be issued by the water company it was provided that so much of the

city's water rental for hydrants as might be required for the purpose should be paid by ths city to the bondholder through their trustee. (See contract at length—Record, pages 37–46). We quote the provision:

> "Section 14. It is hereby agreed by and between the City Water Company and the city of Austin that so much of the hydrant rental to be paid by the city of Austin under the provisions of this contract, as will fully pay the interest on all outstanding bonds of the City Water Company, and all bonds that hereafter may be issued by the said City Water Company, shall be paid to the holders of such bonds, through their trustee, at the time specified in this contract for the payment of such hydrant rental to said company, so long and until all such bonds are fully paid and cancelled, and the balance of the hydrant rental due from the city shall be paid to the said City Water Company. It being understood that the hydrant rental which the city of Austin agrees to pay to the said company for fire protection, or so much of said amount as shall be necessary to pay the interest on such bonds, shall be set aside and paid to the trustee of such bonds, and by him used exclusively and only for the payment of interest upon such bonds when and so long as the same shall become due and payable, but in no event shall the city of Austin pay to said trustee, for such interest, a sum greater than the amount agreed to be paid to the City Water Company."

The consent was granted and the contract was made to run for twenty years, the city reserving the right to purchase, after the expiration of ten years, the entire property of the water company at its appraised value, exclusive of franchise, paying as part of the purchase price any bonds which the company might have issued upon the security of its works.

The city of Austin and its taxpayers knew the City Water Company was not able of itself to furnish means to erect such works, and it was intended by the water company that the money should be obtained by the issuing of bonds,

secured by mortgage, on the water company's property. This plan of raising the money was well known to and approved of by the city of Austin and its taxpayers, and, in order to further it and render the bonds salable, the city inserted in the contract that the hydrant rentals should be applied to payment of interest on the bonds, and if the city purchased the works the purchase money, so far as necessary, was to be applied to payment of the bonds.

When the mortgaged bonds were offered for sale the City Water Company, with the full knowledge and approval of the city of Austin, and, in order to induce purchasers to buy the bonds, stated that the water works were to be erected at the request of and for the benefit of the city of Austin; that the sum to be paid for hydrant rentals was to be applied to the payment of interest on the bonds, and that the proceeds of bonds was to be applied solely to the cost of construction of said water works; that the contract was for twenty years, with the right to the city to purchase the works, and, if so, the purchase money was to be used to pay the bonds.

The plaintiffs each purchased the bonds, relying upon the truth of these representations and believing that the bonds were amply secured by the contract and the appropriation of the moneys under the contract, taken in connection with the value of the water works on which a mortgage to secure the bonds was given.

Under the provisions of this contract and license, the water company proceeded to erect extensive works, to lay mains and pipes and to build powerful fire pumps for the extinguishment of fires. As its work progressed, it issued several series of bonds. An electric light company was also established, and the city granted to it the right to erect poles and maintain a system of electric lights, and a small number of bonds were issued by the company.

The works of the water company were completed on March 6th, 1883, on which day the City Council and the Mayor certified, Record page 48, that the company had

> "Fulfilled and complied with each and all of the provisions of said contract to the entire satisfaction of the Mayor and City Council,"

and that the water rent payable by the city should commence from that date.

On the 28th of June, 1887, all the property of the City Water Company, including its rights, franchises and rentals under the city contract, and all the property of the electric light company, were granted and conveyed to the Austin Water, Light & Power Company,

> "a corporation duly incorporated under the laws of Texas, for the purpose of providing water and electric light and power to the city of Austin,"

and certain bonds were issued by this company.

This new company at once assumed all the contracts with the city, which recognized it as the successor of the original company, and called on it to fulfill the contracts and extend the mains and erect hydrants, as the public convenience required, and has paid to it, or for its benefit, the water rentals as provided. The water company has complied with all the requirements of the city stipulated for in the contract, although it has thus been compelled to extend its mains on many of the streets before there was any adequate custom therefrom to pay for it, and there has been invested in the water and electric plant a sum of about $1,100,000.

There appears to have been no interruption in the contractual relations of the city and the water company from March 6th, 1883, when the Mayor accepted the works and began to pay the water rents, till March 30th, 1890, when the city took the first step looking to a violation of its contract. On this day it passed an ordinance providing for the

issue of $1,400,000.00 of bonds, with which to build its own water works.

On July 31st, 1890, the Mayor and City Council directed these bonds to be sold, and the proceeds applied to the erection of such works. (*R.*, p. 66.)

On April 3rd, 1891, the Legislature of Texas passed an Act granting a new charter to the city of Austin, and authorizing it to build and operate a water and electric light system to supply the city and its inhabitants, and for this purpose to take and acquire such property as may be necessary.

This Act became a law without the approval of the Governor. (R., p. 101.)

The appellants are the owners of the bonds issued by the City Water Company, and, also, by the Austin Water, Light and Power Company as follows:

The Penn Mutual Life Insurance Company of $100,000.00, face value, of the first mortgage bonds issued by the City Water Company; Jacob Tome of $10,000.00, face value, of the second mortgage bonds of the City Water Company; Ogden and Robert Goelet of $50,000.00, face value, of the mortgage bonds issued by the Austin Water, Light and Power Company.

The total issues were as follows:

City Water Company, 1st, $250,000.00.

City Water Company, 2nd, $100,000.00.

Austin Water, Light and Power Company, $750,000.00.

The defendants in error are the Austin Water, Light and Power Company, the city of Austin, the Mayor and the members of the Board of Public Works of that city.

The bondholders show in their bill that the water works had been erected from the money derived from the sale of these bonds, and at the request of and was accepted by the city authorities; that the city had agreed to take water from

the company for public uses for twenty years, and to apply the rental to the payment of the interest on these bonds, and if it should purchase the works, to apply the purchase money to the payment of the principal of the bonds. The city knew that the water company had expended and was continuing to expend a large amount of money by direction of the city in extending the works, and that it was mainly in reliance upon its contract with the water company that these bonds were purchased by plaintiffs.

The City Water Company's works were and are ample to supply the city of Austin and its inhabitants with water. The water supplied is unquestionable in quality and quantity.

The City Water Company and its successor have fully complied with and kept, in all its parts, the contract made with the city of Austin.

The water works to be erected by the City of Austin will not be superior to that of the City Water Company, and will not supply more or better water.

There is no necessity for new water works. The City Water Company's plant does and can fully and amply supply all of the wants of the City of Austin and its inhabitants. If two water works are built the one owned by the city will render worthless that owned by the City Water Company, will destroy the value of the plant pledged to the bondholder to secure the payment of his bonds, and cause irreparable loss and injury to the bondholder.

That the City of Austin, in erecting the new works and proclaiming the intent of the city to wholly repudiate the City Water Company's contract, intends to depreciate and destroy the value of the property of the water company. That the city does not expect by the new works to get a better fire protection, or better water, or a better supply of water. That the bondholders have remonstrated with the city against

its proposed action, but the city has openly repudiated the contract, and has actually begun the erection of new water works, throwing a dam across the river, and contracting for pipes, etc.

> "And it is the declared and avowed intention of the said city to press the construction of said rival system of water works to a speedy completion, and upon completion of the same to discontinue the taking of water from the said water company, and to refuse to perform any of the obligations resting upon the said city as embraced in the said contract with the said City Water Co."

That this was no idle threat is seen by the demurrer in this cause, where the city wholly repudiates the water company's contract.

The result of this action of the city will be to render worthless the property of the City Water Company upon which the mortgage was given, to take away the fund, *i. e.*, hydrant rentals, which the city provided for the payment of interest on the bonds, and in this way take from the bondholder the very security and fund provided for the payment of the interest and principal of his bonds.

Not only this, but to enable the city to raise means to build its new water works, it taxes, contrary to its contract, the property of the City Water Company, and thus makes the City Water Company contribute to its own destruction.

The plaintiffs assert that they and other bondholders of the company have repeatedly applied to the Austin Water, Light & Power Company and its officers, urging them to institute proceedings for the protection of their property against this action on the part of the city, which was destroying the value of the property and the security pledged to the bondholders, but that the officers of the water company, fearing to provoke the further hostility of the city authorities, have refused and failed to take any action for their protection.

The contract was with the City Water Company. Although referred to in the contract, the trustee under the mortgage was not a party to it any more than were the bondholders, who are also mentioned. It is doubtful if any action at law on the contract could be maintained in the name of the trustee. This proceeding, however, is not for the purpose of directly enforcing either the contract or the mortgage. The bondholders, who are the parties substantially interested, whose rights alone are invaded, and whose rights are purely equitable, appeal to a court of equity to protect them from an inequitable and unconscionable attempt to evade the contract and destroy their security, an attempt so indirect that no action at law and no act of their trustee could afford them either protection or remedy.

The bill for injunction and general relief was filed January 3d, 1895, in the Circuit Court of the United States for the Western District of Texas, the plaintiffs all being non-residents of that State.

After stating the facts, it distinctly alleged that the action of the city of Austin was such as to impair and destroy the binding force and obligation of the contract entered into by the City Water Company with the said city, and, therefore, in violation of the provisions and inhibitions of the Federal Constitution. (Paragraph 30.)

Paragraph 33 asserted that the effect of the legislation of the State of Texas in 1891 was to impair the binding force and obligation of the contract between the city of Austin and the City Water Company, and was, therefore, also, in violation of the provisions and inhibitions of the Constitution of the United States.

It asks a decree adjudging that the ordinance and contract accepted and acted upon by all parties are in full force and effect; that the contract is a valid and subsisting one upon

the city as well as upon the water company and the bondholders; that the city must abide by and perform the same; that until its purchase of the existing water works in the manner set forth in the contract, the city of Austin, its Mayor and City Council, have no right to construct rival water works or interfere with the rights of the Austin Water, Light & Power Company; that it is unlawful and inequitable for the city of Austin to levy and collect the tax on the property of this company, and that the city and its officers be enjoined from taking a supply of water for city purposes from any other source, and from proceeding to construct and maintain a new system of water works, and from taking and appropriating, except in the manner provided in said contract, or from interfering with the operation of, the existing works, so constructed at its instance and for its benefit, with money furnished by the bondholders upon the faith of its obligations.

It thus appears:

1. That the water company had granted to it certain privileges, such as laying its pipes in the streets, etc., of the city, and of furnishing water to the city and its citizens, in consideration for which it undertook to erect the needed water works, and to furnish a water supply to the city.

2. The bondholders furnished to the water company the money with which the works were built, the city, on its part, agreeing to pay the interest on the bonds to the extent of the water rental, and the principal in case it should determine to buy the works.

3. The city further agreed that the water which it stipulated should be furnished free of charge should be accepted as payment of taxes on the water company's property.

4. That all of the undertakings on the part of the water company have been fully and faithfully performed. It has

laid mains and pipes wherever the city authorities directed; has supplied new and additional engines and pumps; has furnished water for the extinguishment of fires, and the bondholders have supplied the money for this work on the faith of the city's contract.

5. The city has not only repudiated its contract, but has itself engaged in the business of building new works at the public expense, and by levying taxes on the water company's property for this purpose compels it to contribute the means for its own destruction.

6. The water company, though appealed to by the bondholders, fearing to antagonize the city, passively submits. The bondholders, who are non-residents, appealed to the Federal Court for relief. To render our brief direct and simple, we treat the case as if the City Water Company was still in existence. That it sold out to the Water, Light and Power Company, and that this latter company proceeded to carry out the contract with the consent of the city of Austin, is not denied.

In our judgment this case primarily raises questions under the Federal Constitution, which may be stated as follows:

(1.) In 1882 the city of Austin, a municipal sub-division of the State of Texas, was given by the State of Texas power

"to construct water works," and
"to provide the city with water,"

and, also,

> "the municipal authorities of any city * * * in which any * * * water corporation shall exist are hereby authorized to contract with any such corporation for the * * * supplying of water to streets, alleys, lots, squares and public places in any such city, town or village."

In 1882 the city of Austin made a contract, running twenty years, with the City Water Company to supply Austin and its inhabitants with water, and assented to that company's using its streets.

(2.) The City of Austin was expressly authorized to contract with the City Water Company to supply Austin and its inhabitants with water. In so far as such a contract necessarily, and from the nature of the case, implied an exclusive use as against the city it was expressly authorized by legislation. Except as thus authorized, the City of Austin did not give any exclusive right to the City Water Company.

The contract that was made did not create a monopoly, or one which is prohibited by the constitution or laws of Texas.

It did not pretend to interfere with the accustomed right or privilege of the citizen to sell water, and so far as this case is concerned, it only excluded the city itself from furnishing a double supply.

(3.) The city of Austin was bound to perform its contract in substance and in good faith, and it could not, by its own act, change the *status quo* of the contract so as to deprive the other party of gains which it would have received if the *status quo* had been maintained, nor could it thus take from the bondholder the fund provided for the payment of the interest on his bonds, nor depreciate and lessen, if not utterly destroy, the property pledged to the bondholder for the payment of the principal of said bonds.

The city of Austin did, in supposed compliance with legislative authority, and by the various ordinances of March 31, 1890, the election of May 5, 1890, the ordinance of April 1, 1890, the ordinance of May 5 and May 6, 1890, the ordinance of July 21, 1890, and the ordinance of October 6, 1890, all passed under supposed legislative authority, violate its contract with the City Water Company, in that it proceeded to change the *status quo* of the contract, and to provide for the erection of a rival water works, which would totally destroy the value of the City Water Company; and followed this up by an issue of bonds and the construction of water works, and a declared intent to the effect that, when the new water works was ready to furnish water, the city would refuse any longer to comply with its contract with the City Water Company.

Such ordinances and such action are in violation of that section of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of a contract.

(4)—During the construction of the new works the State gave a new city charter, in which express power is given to the city of Austin to erect, construct, build and operate a water system for supplying the city and its inhabitants with water, and after this charter was passed, and in supposed compliance with the power thereby granted, as well as of the supposed power contained in the legislation which existed in 1882, the city of Austin, a municipal sub-division of the State, proceeded to construct a new water works, and openly repudiated all liability under the contract of the City Water Company, with the declared and avowed determination that it would press the construction of its said system of water works to a speedy completion, and when the same was com-

pleted discontinue the taking of water from the said water company, and refuse to perform any of the obligations of the said water company contract.

This Act of Assembly and the action of the city in pursuance thereof are in violation of that section of the Constitution of the United States prohibiting any State from passing a law impairing the obligations of a contract.

(5)—The city of Austin, in 1862, was authorized, as we have seen, to contract with any corporation for the supply of water. In supposed pursuance of that and other legislative power it made a contract with the City Water Company, and, among other things in that contract, the City Water Company agreed that the city should have the use of water free for hydrants for flushing gutters and sewers; also for the fire department buildings, city hall and offices; also for public schools, for fifteen (15) public watering places, for one (1) fountain in each park, and for the use of the city cemetery;

> "in consideration for all of which the property of the City Water Company shall be and the same is hereby exempted from municipal taxation during the full term for which this contract is executed."

Afterwards, and by the Ordinance of March 31st, 1890, the city imposed a tax of $1.11\frac{1}{2}$ on the $100.00 worth of property made taxable by the charter of the city of Austin, for the purpose of paying the interest and two (2) per cent. sinking fund annually on the said bonds, and the tax was to be known as the water works tax. The city, in the year 1893, contrary to its contract just cited, levied a tax upon the water company of $5,276.80, and, in the year 1894, of

more than $5,000.00, and proposes to continue levying that tax and appropriating the money so obtained to the payment of interest and raising a sinking fund for the bonds which were sold to build the rival water works.

This tax was laid, as the Ordinance shows, in supposed pursuance of legislative and constitutional power, and is, therefore, in conflict with Section 10, Article I, of the Constitution of the United States.

But if, for any reason, and contrary to our hope and belief, this court should decline to affirm the position just stated, and should hold that the action of the city of Austin was rather administrative in character than legislative, and that, therefore, the acts of the city, in repudiation of the contract made with the water company and the attending obligations of the same, were not *laws* of the State of Texas within the meaning of the federal constitution; still, as the Circuit Court had jurisdiction of the bill in this case, by reason of the citizenship of the parties, we ask this court, under its rulings in the case of Horner vs. The United States, 143 *U. S.*, 571, and kindred cases, to consider the following propositions:

See also—

Cornell vs. Green, 163 *U. S.*, 75.
Citizens Bank vs. Cannon 165, *U. S.*, 319.

First. In 1882, the city of Austin, a municipal sub-division of the State of Texas, was given by the State of Texas power "to construct water works," and, also, "to provide the city with water;" and, under the general legislation of the State, it was also provided that "the municipal authorities of any city * * in which any * * water corporation shall exist, are hereby authorized to contract with any such corporation for the * * supplying of water to streets,

alleys, lots, squares or public places in any such city, town or village." In 1882 the city of Austin, in pursuance of such expressed powers, made a contract, running twenty years, with the City Water Company, whereby the City Water Company was to supply the city of Austin and its inhabitants with water, and in which, by ordinance and contract, the city of Austin assented to the use of its streets by the City Water Company.

Second. That the city of Austin was expressly authorized to contract with the City Water Company to supply Austin and its inhabitants with water. In so far as such a contract, from its nature, necessarily implied an exclusive use as against the city's supplying water itself, or building competing works, the city of Austin was expressly authorized, by legislation, to make the same. Except as thus authorized, the city of Austin did not give any exclusive right to the City Water Company. The right that was given is not a monopoly, which is prohibited by the constitution or laws of the State of Texas.

Third. The city of Austin was bound to perform its contract with the City Water Company in substance and good faith, and it could not, by its own act, change the *status quo* of the contract so as to deprive the City Water Company of gains which said water company would have received if the *status quo* has been maintained; and, as the bonds were sold under the circumstances hereinbefore narrated, on the faith of the validity of the contract and the security of the property of the company, the city of Austin could not violate such contract, nor do such acts as would render worthless the security which the bondholder received to insure the payment of the bond.

Fourth. The city of Austin, in holding an election to issue $1,400,000.00 worth of bonds, in passing ordinances authorizing the issuance of the same, in levying the tax to pay the interest and provide a sinking fund for the payment of the bonds, in its avowed intention to erect rival water works of its own, and declaring its intent to wholly repudiate the contract with the City Water Company—was acting in direct contravention of its duty, and it was not carrying out its contract with the city of Austin in good faith, and it was attempting, by its own acts, to change the *status quo* of the contract so as to deprive the City Water Company of the gains and profits it otherwise would have received, and to take from the bondholder the security which he had for the payment of the interest and principal of his bond.

Fifth. The city, by such contract, agreed to rent from the City Water Company a number of hydrants at a fixed price per annum, and stipulated that all of such money, so far as necessary, should be paid to the holders of the bonds to be issued by the City Water Company so long and until all such bonds were fully paid and cancelled, and that the money should be exclusively used for such bonds. On the faith of its promise that the city would carry out the contract the plaintiff purchased said bonds. The city must rent the hydrants and pay for them the price agreed even if a part of the contract, *i. e.*, that granting supposed exclusive privilege, was void. The same result follows as to the duration of the contract. Even if twenty (20) years was too long for a reasonable time the contract will be binding.

Sixth. The provisions of section 11 of the contract were, in consideration that the water company would furnish to the city, for certain purposes, water free of charge, the property of the City Water Company is exempted from municipal tax-

ation during the term that the contract is valid and binding upon the city of Austin, and it cannot lawfully tax the property of the City Water Company to raise funds to enable it, the city, to build competing water works which will render worthless the plant of the City Water Company.

Seventh. Under the facts stated in the bill, and admitted by the demurrer, the bonds were sold on the faith of the validity of the contract, and the promise by the city of Austin that it would carry it out in good faith. As the city of Austin knew and consented to the sale of the bonds under such statements, it is estopped to deny the validity of the contract, at least in so far as the bondholders are concerned, and should be enjoined from violating the said contract or rendering worthless the security of the bonds.

Eighth. Whichever view be ultimately taken, *i. e.*, that the contract and ordinance were in their nature legislative, or that the same were administrative, yet the plaintiffs could not have an adequate remedy at law.

The only adequate relief was a decree declaring the contract valid and binding, and enjoining the City of Austin from the doing of that which would destroy the same. The multiplicity and diversity of the interests, the variety of the questions raised, and the object to be obtained, all show that no adequate relief could be had at law.

POINTS OF LAW.

That we may present, in as direct a way as we can, the views in favor of the foregoing points this portion of the brief is directed to what we have called the affirmative view of our case. In a subsequent portion of it we consider the particular reasons given in the demurrer why the bill should be dismissed.

Affirmative View.

(I.) That a contract was made between the city of Austin and the City Water Company is unquestioned.

All the terms of it are set out and then comes this clause:

> "Now, therefore, these presents witness, that the said party of the first part, for and in consideration of the rights, privileges and agreements herein specified, hereby covenants and agrees to and with the said party of the second part, by its President, M. D. Mather, that it will faithfully keep and abide by the provisions of this contract, and will faithfully and fully discharge, perform, fulfill and carry out all the duties, obligations, powers and all other matters and things by it in said contract provided to be done and performed; and the said party of the second part, on its part, hereby covenants and agrees to and with the said party of the first part that it will faithfully keep and abide by the provisions of this contract, and shall and will faithfully and fully discharge and perform, fulfill and carry out the matters and things of every kind whatsoever by it in said contract provided to be done and performed." (Printed record, page 43.)

Attention is called to a decision of the Circuit Court of Appeals for the Eighth Circuit, opinion by Brewer, J., in National Water Co. vs. Kansas City, 62 *Federal Reptr.*, 853, where a contract very similar to the present was sustained.

(II.) What was it that under the contract the city of Austin granted or promised to do?

Turning to it, we see that it consists of two parts:

(*a*) The privilege granted to the water company.

We quote from the contract:

> "Whereas the City Council of the city of Austin deem it necessary to provide for a more effective protection of the property of tax payers of the said city from fire; and for the further purpose of extending such protection to a larger number of taxpayers, and also to secure the citizens of the said city a supply of water suitable for domestic purposes, and for the further benefits to the city of Austin, hereinafter mentioned, and, in accordance with the seventh and twentieth sections, or paragraphs, of article six (6) of the charter of the city of Austin, together with the other powers contained in said article six (6).
>
> "Therefore, be it ordained by the City Councils of the city of Austin:—
>
> "Section 1. That there is hereby given and granted to the City Water Company the right and privilege for the term of twenty years from the date of the execution of this contract, of supplying the city of Austin and the citizens thereof with water by a system of water works constructed upon the method of supplying a city with water, either for domestic use or for the extinguishment of fire, that is to say: by pumping the water directly into the mains with contrivances by which the pressure on those mains may be increased or diminished, or preserved uniform.
>
> "Sec. 2. The said company is hereby authorized to establish, construct, maintain and operate said

works in said city of Austin; to receive, take and store, construct and distribute water through the city; to construct and extend aqueducts, mains and pipes through all the streets, alleys, lanes and public grounds, across any streams or bridges in said city; to erect and maintain all engines, machinery and other appliances necessary for the proper construction of said works, and for supplying said city and the inhabitants thereof with water for domestic, manufacturing, fire and other purposes.

"The said City Water Company shall have the right to take up all pavements or sidewalks on streets, alleys, lanes or public grounds, and make such excavation therein as may be necessary to lay, repair and maintain aqueducts and pipes below the surface of the ground for conveying and distributing said water as aforesaid, etc."

Printed Record, pages 37, 38.

In brief, those privileges are:

(1.) Supplying the city of Austin and the citizens thereof with water by a system of water works.

(2.) To construct, maintain and operate said works; to receive, store and distribute water through the city; to construct pipes and mains through all the streets of Austin and over bridges; take up pavements and sidewalks for laying pipes to distribute the water.

(b.) The promises the city made as to the future.

(1.) The city agreed to pay an annual rental of $100.00 for each of one hundred hydrants on the main system of the water works.

(2.) The city further agreed to pay a rental of $50.00 per year for other hydrants connected with the extension of the water system.

All of this hydrant rental was to go to the bondholders, the contract providing:

> "Sec. 14. It is hereby agreed by and between the Clty Water Company and the city of Austin that so much of the hydrant rentals to be paid by the city of Austin under the provisions of this contract as will fully pay the interest on all outstanding bonds of the City Water Company, and all bonds that may hereafter be issued by the said City Water Company shall be paid to the holders of such bonds through their trustee at the time specified in this contract for the payment of such hydrant rental to said company, so long and until all such bonds are fully paid and canceled, and the balance of the hydrant rental due from the city shall be paid to the said City Water Company. It being understood that the hydrant rental which the city of Austin agrees to pay to the said company for fire protection, or so much of said amount as shall be necessary to pay the interest on such bonds, shall be set aside and paid to the trustee of such bonds, and by him used exclusively and only for the payment of interest upon such bonds when and so long as the same shall become due and payable, but in no event shall the city of Austin pay to said trustee, for such interest, a sum greater than the amount agreed to be paid to the City Water Company."
>
> *Printed Record*, pages 42, 43.

> "Sec. 11.—The city shall have the right to use the water free of charge from the hydrants for the purpose of flushing gutters and sewers, whenever the council shall deem it necessary for sanitary purposes, upon giving notice to the persons in charge of said water works; the city shall also have water free of charge for the fire department buildings, city hall, and offices occupied for city purposes, for all public schools of the city, for fifteen public watering places, for man and beast, and also for one fountain in each park and public ground, the jets of which shall not exceed in volume one-sixteenth ($\frac{1}{16}$) of an inch orifice, and not to run to exceed six hours a day for eight months in the year, and shall also have water free of charge for the uses and purposes of the city cemetery, in consideration for all of which, the

property of the City Water Company shall be, and the same is hereby exempted from muncipal taxation during the full term for which this contract is executed."

Printed Record, page 41.

The duration of the contract was twenty years, with the option to the city to purchase after ten years upon a valuation to be fixed by arbitrators.

(c.) WHAT WAS IT, UNDER THE CONTRACT, THAT THE CITY WATER COMPANY AGREED TO DO?

It agreed, on its part, to erect a system of water works defined under the contract with considerable particularity, to which we may briefly refer as follows:

"Section 4. The said water works shall be constructed with pumps of not less capacity than three million gallons in twenty-four hours, and also to produce the fire streams hereinafter mentioned, the pumps shall be what is known as the quadruplex compound condensing pumping engines of the Holly Company, and there shall be in addition an auxiliary, or reserve high pressure pump of the same capacity, making an aggregate easy working capacity of five million gallons per day.

"Section 5. The said City Water Company shall lay six miles of mains and pipes, more or less, as shown on the plat which makes a part of this contract, and is marked Exhibit "A," for the distribution of water in the said city, in addition to the mains and pipes already in use. The mains and pipes used in this extension shall be of proper sizes, and the said City Water Company shall replace such of its mains now in use with such other mains and pipes as to secure, in connection with the extensions herein mentioned, an easy flow of water through the entire system of mains, and to comply with all the conditions of this contract; said mains shall be from four inches to sixteen inches in their inner diameter,

and shall be of a standard weight and strength to insure the fire streams hereinafter mentioned.

"Section 7. For all extensions of mains which the city may hereafter order, in addition to the extension contemplated in this contract, the said company shall erect not less than ten (10) fire hydrants to the mile, for which the city shall pay a rental of fifty dollars a year for each hydrant so ordered and erected, payments to be made as hereinbefore mentioned.

"Section 9. Said water works when constructed shall have the capacity of discharging six (6) fire streams at the same time, through one (1) inch nozzles, from any six (6) hydrants located upon pipes not less in size than four inches in their inner diameter, through fifty feet of two and one-half inch hose, to a height of one hundred (100) feet, or to maintain its equivalent in pressure at the nozzle of said hydrants, so long as it may be necessary for the extinguishment of any fires. There shall be always sufficient pressure for all domestic demands.

"Section 10. The City Water Company furthermore agrees to put new hydrants in the place of old ones so as to make the nozzle connections for hose uniform throughout the whole one hundred and twenty-five hydrants located and to be located on the mains and pipes, as shown on the plat accompanying this proposition."

(d.) THE CONTRACT GAVE THE CITY OF AUSTIN CONTROL IN VARIOUS WAYS OF THE WATER WORKS, AND CONCLUDED WITH THE RIGHT OF THE CITY TO PURCHASE.

Section 6 gave the right to the city to take up any of the hydrants on the mains or pipes, and relocate them upon the extensions designated in section 5, and to order 25 additional hydrants.

In section 8 the city of Austin was given the right to erect and connect 25 fire hydrants, free of charge, for the ex-

tinguishment of fire; and also the right to connect stand pipes to the mains of all extensions.

In section 11 the city had the right to use the water, free of charge, from the hydrants, for the purpose of flushing the gutters and sewers, for the fire department buildings, city hall, and office occupied for city purposes, for all public schools, for 15 public watering places, for one fountain in each park and public grounds, and for the uses and purposes of the city cemetery.

In section 13 the city of Austin was given the right to acquire by purchase, and become sole owner of the water plant,

> "including all the grounds, machinery, mains, pipes, buildings and property thereto appertaining, at the expiration of ten (10) years, or at any time thereafter."

The valuation was to be fixed by appraisers, and was to exclude the value of the franchise.

(III.) *When the city made the contract did it exercise its governmental or legislative powers, delegated by the State to it, or did it merely act in its administrative capacity?*

Whether a city, providing for a gas or water supply, acts in pursuance of its governmental powers, or rather as a private corporation and under its administrative powers, is one upon which authorities differ.

That it acts merely as a private corporation is held in City of Petersburg vs. Applegarth, 28 *Grattan*, 221; Western Savings Fund Society vs. City of Philadelphia, 31 *Penna. St.*, 182; Long Island Water Supply Co., 38 *Northeastern Reptr.*, 807.

To the contrary, see :

Springfield Ins. Co. vs. Keeseville, 148 *N. Y.*, 46.
Garrison vs. City of Chicago, 7 *Biss*, 486.

See, also :

New Orleans Water Works Co. vs. Rivers, 115 *U. S.*, 674, 680, 681.

For a general discussion of the question, and when a city acts in its public and when in its private capacity :

1 *Dillon Munic. Corp.*, sections 66, 67, 775.

In the City of Valparaiso vs. Gardner, 97 *Indiana*, 1, the Supreme Court of Indiana said :

> "The important and controlling question which confronts us here is as to the power of the municipal corporation to enter in the contract described in the pleading. We have no doubt that the corporation had authority to contract for a supply of water for a period of twenty years, and that the contract cannot be overthrown solely on the ground that it is a surrender of legislative power. There is a distinction between powers of a legislative character and powers of a business nature. The power to execute a contract for goods, for house, for gas, for water, and the like, is neither a judicial nor a legislative power, but is purely business power. The question is, however, so firmly settled by authority that we deem it unnecessary to further discuss it. City of Indianapolis vs. Indianapolis, etc., Co., 66 *Ind.*, 396; *Dillon Munic. Corp.* (3d ed.), sections 473, 474, authorities N."

It may be that the correct answer is that the contract at bar involves both the governmental, or public, and administrative, or private, powers.

In so far as it is the grant of a privilege (*i. e.*, as to the use of streets) over which the city has control, it is possibly legislative, though even here it is not to be overlooked that the use of the streets was granted by the State to the City Water

Company, and the only control the city had was a power of dissent, and, also, the power of regulation.

See section 629 and section 630, *Revised Statutes of Texas*, which read:

> "Article 629. Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of water or gas as may be required by the city, town or village where located, for public or private buildings, or for other purposes, and such corporation shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, alleys, lanes and squares in such city, town or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe.
>
> "Article 630. The municipal authorities of any city, town or village in which any gas light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or snpplying with water the streets, alleys, lots, squares and public places in any such city, town or village."

In so far as the contract was for the purchase of water from the water company, for which a certain sum was to be paid by the city, as hydrant rental, it was an ordinary business contract made by virtue of its administrative powers.

But whatever be the nature of the power exercised by the city—whether it be public or private—the contract with a corporation of the State, organized and expressly authorized by the State to furnish the city with water, and with which the city is expressly authorized to contract, is a lawful contract which can be enforced.

New Orleans vs. Clark, 95 *U. S.*, 644.

New Orleans Gas Co. vs. Louisiana Light Co., 115 *U. S.*, 659.

National Water Co. vs. Kansas City, 62 *Federal Reports*, 863.

(IV.) In reliance upon the grants and promises of the city of Austin the City Water Company agreed, as we have seen, to build its plant in a certain way and be subject to certain control by the city, and to furnish water at a certain rate to the city and its inhabitants.

The City Water Company carried out its contract and built its works as agreed. On March 8th, 1883, the City Councils and the Mayor certify that

> "the *City Water Company has constructed a system of water works and now has the same in successful operation, in accordance with the provisions of said contract*, and has fulfilled and complied with each and all of the provisions of said contract to the entire satisfaction of the Mayor and City Councils."
> *Printed Record*, page 48.

The money to do this had been raised by the sale of the water company's bonds.

(V.) The power given by the State of Texas to the city in the premises was to provide a supply of water to the city and inhabitants of Austin. It might do this by erecting its own works, or by contract, but it was only one supply it could provide. It could not spend the taxpayers' money

for a double supply. It exhausted its power by the single provision, and hence could not further use the means granted to provide the supply.

White vs. City of Meadville, 177 *Pa. St.*, 643.

Atlantic City Water Co. vs. Atlantic City, 39 *N. J. Eq.*, 367.

The city was authorized to see that a good and sufficient quantity of water was furnished to the city and its inhabitants. The legislature gave it power to do this in one of two ways:

By the city erecting a water works and directly supplying.

By the city providing for a supply by contract with some water corporation.

The city could do either.

It could not do both at the same time.

The thing to be furnished was an adequate supply of water.

The mode by which it would do this was optional with the city, within the scope of delegated power.

But if it saw fit by contract to provide an ample supply it could not, during such supply, and from its own mere whim, take the taxpayers' money and build a water works wholly useless and mischievous.

(VI.) By the very making of the contract the city, on its part, agreed that it would perform the same in good faith, and would not seek to defeat or prevent the performance of it by the water company; that it would not so change the *status quo* of the contract that the water company would be deprived of the gains and profits it

> otherwise would have reaped; that, having the power to buy the water plant at a fair valuation, it would not so act as to destroy its value, and that having agreed to pay a certain hydrant rental, which was to meet the bond interest, it would not so act as to hinder the water company from carrying out its contract.

When a city enters into a contract which is within the scope of its powers, it is bound in the same way and to the same extent as an individual or a private corporation would be, and this whether it contracts about a subject matter which is in its nature public or private.

In *Dillon on Municipal Corporations*, 4th ed., sec. 472, the law is thus stated:

> "But with respect to authorized contracts, a municipal corporation has the same rights and remedies, and is bound thereby, and may be sued thereon, in the same manner as individuals."

In *Beach on Public Corporations*, 1 ed., sec. 216, the doctrine is thus stated:

> "A municipal corporation is liable just as a private corporation or any person upon contracts properly assumed by the corporation."

The Supreme Court of Pennsylvania, in Dunlap vs. Erie Water Commissioners, 151 *Pa.*, 497, 481, said, in reference to the contracts of the city of Erie for the erection of its water works:

> "A corporation is like an individual in its capacity to contract, appoint agents and incur ordinary liabilities."

The Supreme Court of Indiana, in the case of the city of Indianapolis vs. The Consumers Gas Trust Company, 140 *Ind.*, 114, speaking of the contract of the city for gas, said:

"This contract being within the scope of the power invested in appellant, and not in violation of public policy, nor tainted with fraud, must be as binding and enforceable as that of a private corporation or person."

See also:

The Aurora Water Company vs. the City of Aurora, 129 *Mo.*, 540.

City of Indianapolis vs. Gas Light Company, 66 *Ind.*, 396, 407.

Height vs. Board of Commissioners, 68 *Ind.*, 575.

Water Works Company vs. City of Burlington, 43 *Kansas*, 725.

Grand Rapids vs. Hydraulic Co., 66 *Mich.*, 606.

City of New Orleans vs. The Wardens, 11 *La. Ann.*, 244.

Hitchcock vs. Galveston, 96 *U. S.*, 341, 350.

The People *Ex Rel.* The D. W. & Pgh. Ry. Co. vs. Batchelor, 53 *N. Y.*, 140.

The city was bound to carry out its contract in good faith. It could not, by its own act, render performance by the City Water Company impossible or more expensive or more hazzardous. It could not, by its own act, in effect, destroy the value of the plant built at its suggestion, to serve its purposes, nor could it lessen the value of the property of the water company, which is the security of the bondholder for the payment of his bond. Nor could it so act as to strike down the reasonable gains and profits which were to go to the City Water Company under the contract.

The decisions are believed to be practically unanimous in support of these doctrines.

In McIntyre vs. Belcher, 14 *C. B.*, (*N. S.*) 654, sale of medical practice to be paid for out of gross earnings of vendee —held, vendee bound to carry on practice.

In Inchbald vs. W. Neilgherry Coffee Co., 112 *Eng. Com. Law*, 739, Willis J., said:

> "One who enters into a contract is bound to perform his engagement in substance. This is illustrated by the case in B' strok, where the defendant contracted to deliver t he plaintiff a horse, but poisoned him before de ery. This was held to be not a substantial perfo. ance of the contract, because one of the contracting parties had done an act which prevented the other from having the benefit of it. I apprehend that whatever money is to be paid by one man to another upon a given event the party upon whom is cast the obligation to pay is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it."

In Stirling vs. Maitland, 5 *Best & Smith*, 814, an insurance company agreed to appoint B its agent, but the insurance company then sold out and wound up its bussiness—held, insurance company could not do so.

In Planthe vs. Calburn, 8th *Bing.*, 14, the defendants engaged plaintiff to write a treatise for periodical publication, but before finished defendant abandoned publication—held, plaintiff could recover for so doing.

Performance of a contract must be substantial and *bona fide* according to the true meaning of the parties, and not merely colorable.

Addison on Contracts, 1130.

Richardson vs. Barnes, 4 *Exchq.*, 128.

Wharton on Contracts, vol. 2, secs. 654, 671.

Where mine was leased, rent reserved being certain portion of coal mined. Held, plaintiff was bound to commence working immediately and proceed continuously.

Sharp vs. Wright, 28 *Beav.*, 150.
Jones vs. Shears, 7 *C. & P.*, 346.
Phillips vs. Jones, 9 *Sim.*, 519.

Where a debt is assigned the assignor can do nothing to prevent its collection.

Gerard vs. Lewis, 38 *L. J. C. P.*, 173.
15 *W. R.*, 581.
15 *L. T. N. S.*, 663.

A party may do nothing in derogation of his deed or covenant.

Aulton vs. Atkins, 18 *C. B.*, 249.

A sold to B certain personalty by deed, but afterwards he disposed of a bill of exchange, part of the personalty. He made no covenant to deliver it to B.

> "He did something in derogation of his deed when he parted with the possession of the bill of exchange in such manner, and upon such terms as to incapacitate himself, and thereby to prevent the plaintiffs from acquiring or having any right or title to the money therein specified."
> Parnell vs. Hingston, 2 *Jur.*, (N. S.), 854.

In Richardson vs. Barnes, 4 *Exchequer*, 129, an agreement to deliver up a lease was held to mean to deliver it in the condition it was when the agreement was made, and was not performed by delivering it with seal cancelled.

Where a stone quarry was leased at a rental to be determined by the quanity of stone quarried, held that the lessee was bound in good faith to work the quarry, and if he did not the plaintiff could recover on the basis of the quantity he could have mined if he had worked in good faith.

Watson vs. O'Herne, 6 *Watts*, 362, (*Penna. Rpts*).

The same rule is applied under like circumstances to a coal mine or an ore mine.

Lyon vs. Miller, 24 *Penna. St.*, 362.

Koch and Balliett's Appeal, 93 *Penna. St.*, 434.

(VII.) The city of Austin, in 1890, and subsequent years, contrary to the contract and to its duty and these obligations it took upon itself, did proceed to change the status of the contract, by providing for the construction of rival works for the purpose of supplying the city of Austin and its inhabitants with water.

It provided for and had an election of the taxpayers of Austin to authorize the issue of $1,400,000 of bonds for the express purpose of constructing new water works to supply the city; it held such an election and the vote was in favor of the bonds; it passed an ordinance for the issue and sale of the bonds; it proceeded to contract for the erection of a dam and the making of contracts for the supply of pipes, mains, etc., and at the same time it proclaimed its settled, fixed determination as soon as its own works were erected so as to obtain a supply from them, it would refuse any longer to comply with the contracts of 1882, and would no longer pay any hydrant rentals under the same.

It did all this without any pretense of necessity or any excuse whatever.

Unless the city is restrained from proceeding as it has begun the result will be to render worthless the water plant of the City Water Company, and to take from and deprive the bond-

holders of the security which the contract and the mortgage provided both for the principal and interest of the bonds.

(VIII.) The city did this by virtue of supposed legislative power vested in it by the Revised Statutes of Texas, and also by the Act of 1891 of the State of Texas, giving it express power to build the new works.

From which it follows:

(*a*) That the acts of the city and the legislative act of the State of 1891 are laws of the State of Texas within the meaning of that clause of the Federal Constitution which provides that—

No State shall pass any law impairing the obligation of contracts.

(*b*) But if this court should think that no question arises under the Federal Constitution, or that there are other material questions in the case in addition to the constitutional ones, then, as the Circuit Court of the United States had jurisdiction by reason of citizenship, we are at liberty to, and do insist in this court, that still the city should be restrained from its unlawful acts,

Because:

(1) They are in direct violation of its contract, which was duly authorized by the laws of the State of Texas.

(2) The city of Austin exhausted its powers when it, by contract with the City Water Company, provided for a supply of water, and, connecting the legislation of 1891 with that theretofore existing, the city of Austin had not the power, pending a sufficient supply by the water company, to erect its own works.

(3) The city is estopped to deny the validity of its contract of 1882, on the faith of which the bonds of the water company were sold.

(*a.*) Is There a Federal Question?

There can be no reasonable doubt that the acts and conduct of the City of Austin, in disregard of its contract with the City Water Company, flagrantly violate the contract, and therefore materially affect its value. This would *impair* the obligation of the contract.

Sturgis vs. Crowninshield, 4 *Wheaton*, 112.
Green vs. Biddle, 8 *Wheaton*, 84.
Louisiana vs. Pillsbury, 105 *U. S.*, 677.
Douglas vs. Pike Co., 101 *U. S.*, 677.
Cooley's Con. Lim., page 344 and note.
Planters Bank vs. Sharp, 6 *Howard*, 327.
2 *Hare's American Con. Law*, 679.

Can these acts of the city be said to be *laws* of the State of Texas?

If the Act of 1891 of Texas is to be read as conferring a direct and express power on the City of Austin to build the new water works, which would seem to be its meaning, *it certainly* is a law of the State of Texas, and it directly authorizes a municipal division of the State to disregard its contract obligations.

It therefore distinctly raises the Federal question. That act, and all acts of the city done under it, legislative in their nature, are virtually laws of the State.

But as the ordinance of the City of Austin which authorized the vote, and as the vote and the ordinance which authorized the bonds were (probably) all prior to the Act of 1891, are those ordinances and acts governmental or legislative in their character, or are they merely administrative and likened to the private acts of private business corporations?

Reviewing the authorities in the case of the New Orleans Water Works vs. the Louisiana Sugar Company, 125 *U. S.*, 30, this court, *inter alia*, insisting that the law which impairs the obligation of a contract must be the law of the State, said:

> "As later decisions have shown, it is not strictly and literally true that a law of the State in order to come within the constitutional prohibition must be either in the form of a statute enacted by the legislature in the general course of legislation, or in the form of a constitution established by the people of the State as their fundamental law."

In Williams vs. Bruffy, 96 *U. S.*, 176, 183, it was said by Mr. Justice Field in delivering judgment:

"Any enactment from whatever source originating to which the State gives the force of law is a statute of the State within the meaning of the clause cited relating to jurisdiction of this court. * * * So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by a legislature to a corporation as a political subdivision of the State having all the force of a law within the limits of the municipality that it may properly be considered as a law within the meaning of this article of the constitution of the United States."

Hamilton Gas Light Company vs. Hamilton City, 146 *U. S.*, 266.

See also the following cases:

Walla Walla Water Company vs. Walla Walla, 60 *Fed. Rep.*, 957.

Baltimore Trust Company vs. Baltimore, 64 *Fed. Rep.*, 153.

Citizens Street Railway vs. Memphis, 53 *Fed. Rep.*, 715.

Saginaw Gas Company vs. Saginaw, 28 *Fed. Rep.*, 529.

Bacon vs. Texas, 163 *U. S.*, 207, 216.

New Orleans Water Works Company vs. New Orleans, 164 *U. S.*, 471.

Under what seems to be the view taken by this court in the case of the New Orleans Water Works Company vs. Rivers, 115 *U. S.*, 674, 680, 681, and, also, in the case of the New Orleans Gas Company vs. Louisiana Light Company, 115 *U. S.*, 650, 659, 660, that the right to supply a city with water or with gas is, at least in part, legislative and governmental in its nature, and not merely administrative, it would follow that the ordinances and votes of the councils and the citizens of the city of Austin to issue bonds to erect new water works

to supply the city of Austin with water, are legislative in their nature, and the exercise of legislative and governmental power, and, therefore, the law of the State of Texas within the meaning of the Federal Constitution.

This court has frequently held that a contract not to exercise the taxing power by a State as to a particular property is valid, and hence the question of the nature of this power the city uses is not believed to be material on this branch of the case.

Jefferson Branch S. Bank vs. Skelly, 1 *Black*, 436.
New Jersey vs. Wilson, 7 *Cranch*, 164.

(*b.*) In addition to the constitutional question, the Circuit Court had full jurisdiction of the case by reason of the citizenship of the parties, and this being so, the case was a plain one for the equitable relief prayed for in the bill on the following grounds:

(1.) That the acts and threatened acts of the city were contrary to the contract obligations of the city of Austin, and therefore the city should be restrained.

(2.) That the city had exausted its power in providing a water supply, and could not impose an additional burden of taxes for a second and useless supply.

(3.) Even if it were doubtful whether the contract was binding on the city, yet, as on the faith of its validity the bondholders bought their bonds, with the

assurance of the city of the validity of the contract, the city is now estopped to deny the same.

In so far as these positions raise questions of fact, it is not thought necessary to discuss them. The plain statements of the contract and the bill, in unmistakable language, show the grossest violation of good faith by the city of Austin, and an utter disregard of its contract obligations. If an individual or a private corporation were so acting, no one would doubt that relief should and would be granted. Unless this contract can be shown to be one the city of Austin had no power to make, which we consider *supra*, the same relief should be given against it as against a private individual.

This view of the case renders unimportant the question of whether the contract and the subsequent acts of erecting new works was the exercise of governmental powers by the city or merely administrative. Whether either, or both, the result is the same if the contract is valid.

It will also be noticed that this point involves the entire contract and all of its parts.

Suppose it could be held that in so far as this contract was exclusive it was unlawful, yet this does not strike down the entire contract, but still leaves the city bound by what are the valid parts of it, as for example the hydrant rentals.

Or, suppose it be said that twenty years was an undue and unlawful length of time for the contract, yet the city would be bound for such a length of time as was lawful and reasonable.

Columbus Water Company vs. City of Columbus, 48 *Kansas*, 99.

The discussion so far has assumed the validity of the contract between the City Water Company and the city of Austin.

But it is insisted that the contract is void, and the reasons given are, in brief, as follows:

(1.) That in and by the contract itself the city of Austin sought to give to the City Water Company the exclusive right to supply Austin and its people with water for 20 years, and as this was not authorized by legislation of the State it is *ultra vires* the city.

(2.) That if the State or the city did grant such privileges to the City Water Company it was the grant of

a monopoly which was contrary to the Constitution of the State.

(3.) That the Act of 1891, granted to the city of Austin the power to issue bonds for erecting new water works, and this legislation was valid notwithstanding the contract with the City Water Company, because of that clause of the Constitution of Texas, which provides:

> "and no irrevocable or uncontrollable grant of special privileges or immunities shall be made."

An examination of the contract, printed at length (pages 36 to 44, Record), will demonstrate—

(*a.*) That there are no provisions in its terms making it exclusive. The city of Austin did not covenant that only the City Water Company should have the right to supply Austin with water. Notwithstanding that coutract possibly the State of Texas might have created other corporations, and given to them or to individuals the power to supply water to Austin, without rendering the city of Austin liable as for a breach of contract.

The contract was exclusive only to the extent that the very nature of the subject matter made it so, and in so far as the city by making it exhausted its power, and in good faith was bound to carry out the contract.

It is true that the contract was for a supply of water; that we agreed to furnish this; that the city could only contract for one supply; that its duty was to get a supply. and to do this two powers were given it:

(1.) To itself erect water works and furnish the supply.
(2.) To contract with water corporations expressly created by the State to supply water to towns and cities.

When it procured the supply by the exercise of either power the other lay dormant. If it contracted for the supply it could not itself build works while the supply was being furnished under contract.

White vs. Borough of Meadville, 177 *Pa. St.*, 643.

So the same effect was produced by the duty of the city to carry out its part of the contract in good faith, and not do that which would defeat or render unprofitable its performance by the City Water Company; and as the building of new water works by the city would do this the city could not, pending the City Water Company contract and supply, build its own works.

To this extent, at least, the city of Austin was expressly authorized by the State of Texas to contract with the City Water Company.

Sections 565 to 570 of the Revised Statutes of Texas authorized the free incorporation of companies for

"the supply of water to the public,"

and then sections 629 and 630 of the Revised Statutes of Texas read that:

> "Article 629. Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of water or gas as may be required by the city, town or village where located,

for public or private buildings, or for other purposes, and such corporation shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, alleys, lanes and squares in such city, town or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe.

"Article 630. The municipal authorities of any city, town or village in which any gas light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, alleys, lots, squares and public places in any such city, town or village."

The municipal power in the premises, it will be noticed, is its control, in the first place, of the power of the corporation to lay pipes through the streets, and its authority to prescribe regulations for the corporation. Added to that it also has the power—

> "to contract with any such corporation for the supplying with water the streets, alleys, lots, squares and public places in any such city, town or village."

If it may contract, it may necessarily assume the invariable accompaniments and obligations of a contract, including the duty to act in good faith in carrying it out. It will be noticed that the thing it may contract for is a *supply*.

Here is the express statutory authority to make the contract; the express statutory power to establish regulations as to water companies, and the express statutory power to assent or dissent to a grant to the water company of the right to use the streets, and, therefore, to impose terms connected with the grant.

In the making of the contract, then, the city of Austin had express authority from the State, and therefore was not subject to animadversion on that grouud.

Indeed, in the case hereinafter considered of Brenham against the Water Company, 67 *Texas*, 558, on which the de-

murrants rely, the court admitted the power of the State to make *some* contract for the supply of water, but denied its right to make a contract for the period of twenty years.

This power given to the city to provide a water supply is not limited as to time. If water works were to be erected by the city, supply would be during the duration of these works. As a parallel power the city was authorized to provide by contract for a supply of water.

For what length of time might it make such a contract?

There is no limit in the authority conferred, and it must depend upon the discretion of the municipal authorities taking all the circumstances of the case into consideration.

To put it very mildly, where the contract is to build a new water works by the contracting party, in order to supply a city of over 10,000 inhabitants, and where a very large amount of money is to be invested in the plant, a term of ten years, with the right on the part of the city to take the works at any time after ten years, upon a valution to be fixed by appraisers, is certainly not unreasonable.

THE CONCLUSION THEN IS, THAT IN THE MAKING OF THE CONTRACT THE CITY OF AUSTIN HAD EXPRESS LEGISLATIVE AUTHORITY FOR SO DOING, AND THAT THE CONTRACT IS NOT ULTRA VIRES.

See city of Memphis vs. Memphis Water Co., 5 *Hershell*, 495;

Atlantic City Water Co. vs. Atlantic City, 48 *New Jersey*, 378.

Does the contract create a monopoly?

In the case of the Charles River Bridge vs. Warren Bridge, 11 Peters, 607, Judge Story defined a monopoly as follows;

"An exclusive right granted to a few for something which was before of common right. Thus, a privilege granted by the King for the sole buying, selling, making, working or using a thing whereby the subject in general is restrained from that liberty of manufacturing or trading which before he had, is a monopoly."

The case of Monopolies. 11 *Rep.*, 84.

Slaughter House Cases, 16 *Wall.*, 65.

The Crescent City Gas Light Co. vs. the New Orleans Gas Light Co., 27 *La. Ann.*, 138, 147.

New Orleans Gas Co. vs. La. Light Co., 115 *U. S.*, 658, 664.

Louisville Gas Co. vs. Citizens' Gas Co., 115 *U. S.*, 683.

New Orleans Water Works Co. vs. Rivers, 115 *U.* S., 674.

It never was of *common right* that the citizens of Texas had the power to lay pipes through the streets of the City of Austin and supply the City of Austin and its inhabitants with water. To do that required the use of the streets and highways running through the City of Austin, and which belonged to the State, and which no one could use for such a purpose without the consent of the State.

When the State created the City Water Company and gave it the power to do this, subject to the assent of the City of Austin, and with the right on the part of the City of Austin to contract with it for a water supply, the contract thus made was not the creation of a monopoly. It did not take from the citizens anything which was before of common right.

It was not, therefore, within the fair meaning of that clause of the constitution of Texas which provided that

"perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."

Was this contract, in any fair sense, in conflict with that provision of the constitution of Texas which enacts that :

> "And no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof."

This does not prohibit the granting of special privileges or immunities.

It merely enacts that the privileges or immunities granted shall not be irrevocable or uncontrollable. It gives to the Legislature the power to control such franchises and privileges as are granted by it.

See matter of Union Ferry Co., 98 *New York*, 139.

As we have seen, the Legislature granted to the City Water Company the privilege of using the streets and alleys of the city of Austin for its plant, subject to the regulations of and the assent of the city of Austin. This grant was neither uncontrollable nor irrevocable, and the State may, under constitutional authority, control the same.

When, however, the State authorized its municipal subdivision, the city of Austin, to contract for a water supply, the State did not reserve to itself, under this clause, the right either by itself or by the city of Austin to violate that contract. The Act of 1891, called the New Charter for the city of Austin, does not pretend to give to the city of Austin, in express terms, the power to violate the contract it made under the State authority with the city of Austin. It did authorize the city of Austin to construct new water works, but it did not authorize it so to do, if by its contract, and subject to the obligations of the same, the city of Austin could not lawfully do so. If such is the meaning of the Act of 1891, as we have seen, it is a law violating the contract and a law of the State of Texas.

(V.) The contract of the city of Austin with the City Water Co. was directly authorized by authority from the State. Section 630 of the Revised Statutes provided that:

> "The municipal authorities of any city, town or village in which any gas light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, alleys, lots, squares and public places in any such city, town or village."

Our case is not governed by Brenham vs. City of Brenham, decided by the Supreme Court of Texas.

The case of Brenham vs. the Water Company, 67 *Texas*, 542, will be relied upon as conclusive of the proposition that the contract between the city of Austin and the City Water Company was *ultra vires* the power of the State, and therefore void, because:

(*a*) It was the grant of an exclusive privilege to the City Water Company without express legislative authority.

(*b*) That the contract created a monopoly of the City Water Company, and was, therefore, void.

The Brenham case was not decided until 1887.

The contract of the City Water Company with the city of Austin was made in 1882, and its works completed in March, 1883. Its bonds had been sold and purchased by part of the plaintiffs prior to the latter date, and the money used in the construction of the works. Its first issue of bonds bears date July 1st, 1882. Of these the Penn Mutual Life Insurance Company bought $100,000 face value for $102,000.

In the case at bar, therefore, as the decision of the Supreme Court of Texas was made years after the contract of the city of Austin with the City Water Company, and years after the purchase of bonds issued by the City Water Company on the faith of the validity of that contract, said decision in the case of Brenham vs. Brenham Water Company, 67 *Texas*, is not conclusive upon this court, except in so far as its reason meets with its approval.

Carroll County vs. Smith, 111 *U. S.*, 562, 563.

East Alabama Railway Co. vs. Doe, 114 *U. S.*, 353.

See, also—

Wilmington & Weldon R. Rd. vs. Alsbrook, 146 *U. S.*, 279-293.

Mobile & Ohio R. Rd. vs. Tennessee, 153 *U. S.*, 486-492.

If this court is persuaded that, on a fair construction of the contract in suit and of the Revised Statutes and Constitution of the State of Texas, the city of Austin had the power in 1882 to make this contract, and that the same was not the creation of a monopoly within any well known definition of that term, then it is submitted that the contract should be held binding, notwithstanding the decision of the Supreme Court of Texas in the Brenham case.

The decision of the Supreme Court of Texas in the city of Austin vs. Nalle, 85 *Texas*, 520, touches only indirectly upon any of the questions in the case at bar.

It was asserted in the brief for the appellant in that case, (page 527), that as the city had an ample water supply by

contract it had exhausted its power. To which the counsel for the defendants replied that it was immaterial to the points under discussion, and that, if material, the facts were not before the court. The only reference to it which the court made is on page 549, and is as follows:

> "It is further alleged, that at the time of the passage of the ordinances for the election and the issue of bonds, the city had a contract with a certain company, by which it was provided with an adequate supply of light and water, and that that company was still able and willing to carry out its contract, and to supply all the light and water which the necessities of the city required; and it is insisted, that by such contract the city had exhausted its power to procure water and light from any other source. It seems to us the statement of the proposition carries with it its own refutation. In this State no city can grant an exclusive right to furnish either water or lights. Brenham vs. Water Company, 67 Texas, 544. The argument comes down to this, that whenever a city has made a contract with a company able and willing to supply it with the necessary water and lights—terminable it may be at the city's option, and burdensome in its terms—its power is exhausted, and any attempt to procure water and light by other means is ultra vires and void. Such an argument cannot be maintained."

Our position is not in conflict with the long list of cases following the Charles River Bridge case, 11 Peters, 548, and of which the following are the latest and most striking examples:

Stein vs. Supply Co., 141 *U. S.*, 67.

Syracuse Water Co. vs. City of Syracuse, 116 *New York*, 167.

Matter of the City of Brooklyn vs. Long Island Water Supply Co., 143 *New York*, 596.

Oregon Ry. & Nav. Co. vs. Oregon Ry. Co., 130 *U. S.*, 1.

We do not claim that the State of Texas in incorporating the City Water Company covenanted with us that no other corporation would be created with similar privileges, or that we thereby gained an exclusive right to supply Austin with water. What we do claim is that the City of Austin had the power:

(1.) Either to build its own works and supply itself with water; or,

(2.) To contract for such a supply with the City Water Company.

It did the latter.

The City of Austin was as much bound by its contract as the water company was. Neither could prevent performance by the other, or so change the *status quo* as to take from the other the gains naturally flowing from performance.

The grant was not for an unreasonable time, nor, in any sense, a perpetuity. Surely twenty (20) years, with the right to buy in ten (10), at a valuation fixed by arbitration, is not unreasonable when a large sum of money, immediately, at least $350,000, was invested in the plant, and the only hope of return was from the sale of water to Austin and its inhabitants.

The City of Austin, therefore, could not build its own water works, because by so doing it prevented performance by the City Water Company, took from it the gains and profits it otherwise would have made, and rendered the contract and the property of the water company practically valueless.

The question is one of contract.

The City of Austin is just as much bound by its contract and its performance, and is just as liable for its breach, as an

individual would be. It is as much bound to good faith as an individual.

If it had the power to make the contract it must, in good faith, carry it out.

To erect new water works for the city of Austin is flagrant bad faith on its part.

The very thing the city of Austin contracted about was, in its nature, exclusive.

It was a *supply* of water.

Having one supply the city had not power to procure another.

If the city, under valid authority, saw fit to contract for the supply it cannot strike down and disregard its own contract.

We differ, and materially differ, from the Charles River Bridge case, and all cases following in its train. We stand upon our contract and our contract rights, and not upon any special grant of exclusive privilege.

Nor are we troubled with the decision in Syracuse Water Co. vs. City of Syracuse, 116 *New York*, 181.

In that case there was no contract, and the exclusive privilege claimed was in perpetuity.

The case of Richmond County Gas Light Co. vs. Middleton, 59 *New York*, 231, was where the Legislature repealed the statute upon which the authority of the municipality depended, and this was held to terminate the contract it had made for gas light.

How far that case can stand under the reasoning in the People of the State of New York vs. O'Brien, 111 *New York*, 1, may be doubtful, but it is a question which we do not have

in this case. Texas never did repeal the act authorizing our contract.

That this case does not fall within the Charles River Bridge case may be shown by the following among other reasons:

(1.) The water works were erected by the City Water Company relying upon the promise of the City of Austin that the company should have the right, for a definite period, to supply Austin with water, and that the City of Austin would pay a yearly rental to the City Water Company for hydrants, to be maintained and supplied with water by the City Water Company.

The gains and profits which the City Water Company was to derive from its contract was from the sale of water to the inhabitants of Austin, and the payment of the hydrant rentals by the City of Austin. The City of Austin, therefore, was an actor under the contract, as was, also, the City Water Company.

In this respect the distinction is marked between our case and that of the Charles River Bridge; that bridge was not erected by virtue of any promise made by the Bridge Company to the State. The State never promised the Bridge Company to pay any portions of the tolls, or make any use of the bridge. The Bridge Company could not point to any promise on the part of the State as to the future gains and profits from the use of the bridge if the Bridge Company erected the structure. If there was any contract relation whatever

between the two it is what might be termed the technical one growing out of the Dartmouth College decision, but this did not bind the State to any action on its part in the future.

(2)—The rule of construction where the question is as between the State and the corporation as to franchises granted is strictly in favor of the State and against the corporation as to the franchises granted by the State to the corporation. There is no intendment or inference in favor of the corporation as against the State.

In this respect the contract between the City Water Company and the city of Austin is governed by another rule, and that is, that the intent and meaning of the parties to the contract is to govern, and that intent is to be ascertained by a fair construction of the words used, giving to each word its usual and ordinary meaning. The rules of law which govern such a contract are exactly the same as those which govern a contract between two individuals. Let A represent the city of Austin and B the City Water Company, and supposing A and B had made the identical contract which the city of Austin made with the City Water Company. Undoubtedly, under the authorities we have cited, A could not destroy the contract, nor prevent its performance by B, nor so act as to render performance more difficult by B, or to take from B the gains and profits which he would naturally receive from carrying out the contract, or change the status of the contract so that B would be prevented from receiving those gains and profits.

Our position is, that if this be true as to a contract between A and B, it is equally true as to the contract between the city of Austin and the City Water Company.

Police Power.

It is not intended to claim that this contract deprived the city of Austin of the police power delegated to it by the State, and that the city, in case of an emergency or a necessity, could procure a water supply elsewhere under the police power may be conceded. What we insist upon is, that the City of Austin cannot do this of its own mere will without any necessity or occasion therefor. So long as the City Water Company is giving it an ample and sufficient supply of water the city of Austin cannot build its own works, and thereby strike down its contract with the City Water Company. This is not an exercise of the police power by the city, because it is not pretended that the building of the new works is necessary to the public health, safety or convenience.

This case is, therefore, free from the difficulty which seems to have troubled so many courts, that a contract, running a number of years, for the supply of water or gas to a city, deprived the city, pending the contract, of the exercise of its police powers, and, therefore, was invalid. The reply is, the contract at bar does not so deprive the city of its police power, but leaves it in full possession of the same, and the city may freely exercise this police power when the necessity arises for it so to do.

The New Orleans Gas Co. vs. The Louisiana Light Co., 115 *U. S.*, 650;

Tiedeman on Municipal Corporations, sec. 144, and cases cited.

This book seems to contain a reference to practically all of the cases on the question, on whichever side of the controversy they may be.

Hydrant Rentals.

The city of Austin, under this contract, agreed to pay the City Water Company $100 a year each for one hundred hydrants, and this money the contract provided should be applied to the payment of the interest on the bonds which were to be sold to carry out, by the City Water Company, its part of the contract,—that is, the extension and completion of the water works. The contract was to run absolutely ten years, with the right of the city to buy at any time thereafter. If the city did not buy the contract was for twenty years, with a provision for renewal.

This portion of the contract, which expressly appropriates the hydrant rentals for the payment of the interest on the bonds, is the one in which the bondholder is particularly and directly interested. The money was a trust fund, of which he, the bondholder, became the *cestui que trustents.* The City Water Company, and, indeed, the city of Austin, in part, became trustees for the payment of and the appropriation of the hydrant rentals to the interest on his bonds.

The city, in this regard, surely made a contract which was valid and binding, even if it could be proven that she could erect her own water works. Even if the new water works were erected by the city she was still bound under this contract to pay the hydrant rentals, and the bondholder was still entitled to have the same appropriated to the payment of the interest on his bonds.

If the city saw fit to erect a new water works, and it had the lawful right so to do, this is no excuse why it should not fulfill its contract with the bondholder and for ten years pay one hundred dollars a year each for one hundred hydrants, and that this money should go to the bondholder on account of the interest and principal of the bonds.

While in the hydrant rental the bondholder is directly interested, it is also true that he is largely interested also in any depreciation of the water plant, which is the security to him, under the mortgage, for the payment of the principal and interest of his bonds.

NEGATIVE VIEW.

The city by its demurrer, admits all allegations of fact but it alleges:

(1.) That the original contract was void under the Constitution and Laws of Texas.

(2.) That the city has, and always had, the right to build its own water works.

(3.) That the city had no right to exempt the water works from taxation, or accept water for public use in payment thereof.

(4.) That even if the contract and charter had in express terms sought to grant to the Water Company the exclusive right to furnish the city and its inhabitants with water, under the Constitution and laws of Texas such grant was revocable.

(5.) That the grant of the new charter to Austin by the Legislature is a revocation of this contract.

(6.) That the plaintiffs have their remedy at law.

The United States Circuit Court sustained the demurrer and dismissed the bill as without equity, but filed no opinion.

I.

The first ground of the defendants' demurrer is that the contract between the city and the water company is *ultra vires* and void.

With the provisions in the general law of the State permitting cities to make contracts with water companies, it cannot be claimed that every such contract is void. The contention must mean that this particular contract is void, either because it is an *exclusive* contract, or because it is made *to run for twenty years.*

The defendants confound two distinct features coutained in this ordinance of the Mayor and City Council:

(1.) The assent of the city that the water company might lay pipes in the streets of the city and to supply water.

(2.) The contract with the water company to take water from it for a period of twenty years, reserving the right to the city to purchase the property of the company at the expiration of ten years.

We will consider these separately.

Even if it be charged that our license was exclusive, it would not necessarily destroy it.

It cannot be denied that a State has the right to grant an exclusive license to a private corporation to lay pipes in the streets of a city for gas or water, unless there be something in the constitution prohibiting it, and in the same way it may delegate to a municipal corporation the power to grant such a license without its becoming obnoxious to the prohibition against creating monopolies.

> "A private corporation, as well as individuals, may be employed by a city in the construction of water works for the health, comfort and convenience of its citizens, and though such works may be used by the corporation for its own gain, yet as they advance the public good the corporation may be properly aided in their construction by the city. Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business open as of common right to all upon terms of equality; for the right to dig up the streets and other public ways, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the State or by the municipal government of the city acting under legislative authority.
>
> N. O. Gas Co. vs. Louisiana Gas Co., 115 *U. S.*, p. 659.

The easement to lay pipes and mains through the city of Austin was primarily given by the State of Texas to the City Water Company. The statute (sec. 629) expressly grants it. The words are:

> "And such corporation shall have power to lay pipes' mains and conductors for conducting gas or water through the streets, alleys, lanes and squares in such city, town or village, with the consent of the municipal authorities thereof and under such regulations as they may prescribe."

The city's power over the grant is only to refuse or grant consent and make reasonable regulations. It does not make the grant itself.

It may attach to the consent *conditions*, and may make regulations.

With these powers of the city the statutes give another, i. e., the power to contract with any water corporation for supplying water.

Surely it cannot be successfully claimed that it ever was of common right to the citizen to lay pipes for distributing water through the city, or to require municipal assent to the same, or to contract with the city for a supply of water.

We do not claim that the State of Texas gave us an exclusive license to lay pipes in the streets of Austin, or that it delegated to the city the right to grant such license. Therefore, the ordinance which was passed by the city is not, for this reason, *ultra vires* or void.

We do, however, insist that, as the city was authorized to contract with any water corporation for a supply of water, the *contract* was to be governed by those ordinary and usual rules of law applying to contracts, and among these was the duty of the contracting party to act in good faith, and not to do that which would in effect destroy the contract. If the very nature of the contract was such that the city destroyed its value to the contracting party, and made it impossible for him to carry it out if it built rival works to also supply the city with water, the law of the contract forbade it.

We next consider whether it was bad because it made a contract which might run for twenty years or longer, unless the city saw fit to terminate it in the manner provided in the contract.

The power which the state gave to the city to make a contract, did not limit either the length of time nor the consideration to be paid. Both of these were left to the discretion of the city authorities, and in each instance had to be determined by the circumstances of the particular case.

Here was the case of a city that stood in urgent need of means to supply its inhabitants with water, and to extinguish fires, and which had no money nor credit to enable it to do this. It contracts with the water company in consideration of the expense and risk which the latter incurs, to take the city supply from it for ten years (for at the end of that period the city can terminate the contract), and pay it a price fixed by the city itself. This was surely a reasonable exercise of the power the state had granted. That the *contract* for the water which was to be used by the city for public purposes, including the extinguishment of fires, was an *exclusive contract* for the period named, was only to give it the character which pertains to almost every contract that a city makes. If it contracts for coal to heat the court house and jail and city hall, or lamps to light its streets, or paper and envelopes to enable its business to be contracted—all these are necessarily in their nature exclusive; otherwise the taxpayers' money would be uselessly spent in securing double supplies. The length of time the particular contract is to run depends much on the nature of the thing to be supplied. It may be confidently asserted that it was the only kind of contract that the city could have made at the time, for no company would have undertaken to build works involving so large an expenditure if at the end of a year its most valuable customer could withdraw.

The water company doubtless felt that with a license to use the streets, with one large customer assured to it for ten years, with a contract that during that period it could pay its taxes in water supplied to the city, that after ten years the city would either continue its custom or would buy its works, the enterprise of building these works was a fair business venture. Certainly those who bought the bonds believed it.

Was the contract *ultra vires* and void because it was made for ten years or twenty years, as the city might determine?

> "A city was authorized by its charter to grant water work privileges to private companies, to itself erect water works, or to purchase or condemn water works erected by others. It granted the rights to a corporation, and stipulated that it would not itself erect competing water works for a period of twenty-five years, but this was not to prevent it from purchasing or condemning the plant at any time. Held that the stipulation was valid, and that a breach thereof by the city would impair the obligation of the contract within the meaning of the federal constitution, and that therefore a federal court would have jurisdiction to enjoin the city from constructing water works or issuing bonds therefor."
>
> Walla Walla Water Co., 60 *Fed. Rep.*, 659.

A State statute authorized a town to construct water works and also to contract with third parties for a water supply. The town adopted the latter course, and granted to a corporation a right to construct water works, and to supply the town on certain conditions. After the water company had constructed an adequate plant, and was prepared to comply with its contract in all essentials, the town passed a vote to itself construct a water works plant. Held:

> "That as this action was taken under authority of the State statute, it was in effect an act of the State, which impaired the obligation of the previous contract with the water company, contrary to the Constitution of the United States.
>
> "The final question thus recurs whether the vote of the town of April 11th, 1895, and the subsequent votes and proceedings do impair the obligations of the contract made June 29th, 1885.
>
> "There can be no doubt that the effect of carrying out this vote will be greatly to depreciate the value of the water works, and of the bonds issued by them, and that the town intends to proceed to construct its works and to supply water to the inhabitants regardless of these consequences.

"The Westerly Water Works will remain under the obligation of the contract to supply water without charge to the town hall, and for drinking fountains, to maintain a prescribed head of water, and perhaps sell their works to the town at an appraised value.

"It seems reasonably clear that if there be a contract here, the value of the contract at least will be materially impaired. The respondents urge that to grant relief here prayed, and to enjoin the construction of the water works would be in effect to give to the complainants the benefit of an exclusive franchise, to which benefit they are not entitled. This statement, however, is not entirely correct. If the complainants had an exclusive right, they could enjoin any other works, even if they were unable to supply the persons to be accommodated by the proposed works, and even if there were no immediate ascertainable injury to themselves. This is the result as it seems to me from all of the cases on this question, provided always that the conduct of the owner of the franchise is not such as to forfeit their rights. On the other hand, to refuse relief here would be to permit the destruction of the whole contract. There must be some rights which are entitled to be protected under a contract admitted and found to be valid."

Westerly Water Works Case, 75 *Fed. Rep.*, 81, (1896).

"The granting of the privilege formerly enjoyed by a municipal corporation by legislative enactment to a private corporation for its exclusive use for a term of years, is not unconstitutional; and having been granted is, during the term, a contract beyond the reach of subsequent legislative interference."

City of Memphis vs. Memphis Water Co., 5 *Heiskell*, 495.

"A city of the second class has the power to enter into a contract with private parties or a corporation, for water to be furnished it for fire protection by such parties or corporation; and when a city of the second class has entered into such a contract and a water works plant has been erected and maintained at a great expense for the period of four years or more, and during that time the corporation owning the plant has furnished water in accordance with the contract entered into and recognized by the city, and the city has levied the proper tax and paid

the hydrant rental for three years, and otherwise recognized the validity of such contract, *held*, that this court will not hold the contract void under the facts as stated in the petition, because the city did not possess the power to make a contract for the period of twenty-one years. While the city may be powerless to make a contract for the duration alleged, still the contract should be upheld for a reasonable time, when the circumstances and condition of the city as to population and assessed valuation are substantially the same, and no better facilities are offered upon more reasonable terms."

Columbus Water Co. vs. City of Columbus, 48 *Kans.*, 99.

"It being the duty of the municipal corporation to light the streets, etc., where such corporation has the power by legislative grant to erect and maintain gas works, it follows, that it has the implied power to contract with others to furnish it in like manner, and may, therefore, by contract, grant to a corporation the exclusive right to the use of its streets for a term of years.

"Injunction is the proper remedy to prevent a city which has by contract conferred such a privilege upon another corporation."

City of Newport vs. Newport Gas Co., 84 *Ky.*, 166.
See also, City of Louisville vs. Wible, 84 *Ky.*, 290.

"The legislative grant of an exclusive right to supply gas to a municipality and its inhabitants by means of pipes, etc., and upon condition of the performance of a public service, after the performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it. In granting such a contract the State does not part with its police power."

Louisville Gas Co., 115 *U. S.*, 683.

"Where a city by ordinance grants the right to a party to construct water works at his expense to supply the city and its inhabitants with water, with the right to lay water pipes under the surface of the streets and alleys for a period of years, which grant is accepted and the work partially performed, the privilege of the use of the streets is not a mere license revocable at the pleasure of the City Council, but is a grant under an express contract for

an adequate consideration, and is binding as a contract. When there is power in a city to make a contract, there is power to make one that will bind the parties."

City of Quincy vs. Buel, 106 *Ill.*, 337.

"A city of the second class under the laws of the State of Kansas has power to contract with a private party for the construction and operation of water works, to agree to pay rent for the use of hydrants, and to grant such a party the use of its streets for the purpose of laying pipes to conduct the water.

"Such a city has no power to grant to a private party the exclusive right to use its streets for that purpose.

"When a divisible part of a contract is *ultra vires*, but that part is neither *malum in se* nor *malum prohibitum*, the remainder of the contract may be enforced, unless it appears from a consideration of the entire agreement that it would not have been made independently of the part which is void.

"The invalidity of the exclusive grant by a city of the right to use its streets to conduct water to its inhabitants is no defense to an action for the rents the city promised to pay to the grantee for the use of the hydrants after the works have been constructed according to the contract and have been acepted by the city.

"The members of the legislative body of a city may not so act or contract as to deprive their successors of the unimpaired exercise of the legislative or governmental power conferred upon the body for the purpose of ruling the inhabitants of the city, but this rule is inapplicable to the exercise of the business or proprietary powers of the municipality, such as the power to contract for water works, because such powers are conferred upon the legislative body of a city for the private benefit of its inhabitants and itself as a personalty, rather than to enable it to govern its citizens.

"In the exercise of these business powers a municipality is governed by the same rules as a private corporation or an individual, and it may make contracts for terms longer than the duration of the terms of office of the members of its legislative body.

"*Held*, further: The legislature intrusted the determination of the length of the term of such a contract to the discretion of the City Council, and in the absence of evidence of a gross abuse of that discretion it is not the

province of a court to declare such a contract void because its term was twenty-one years."

Illinois Trust and Savings Bank vs. City of Arkansas, U. S. Court of Appeals, Eighth Circuit. 76 *Fed. Rep.*, 271, (1896).

II.

The second ground of demurrer is that the city has and always had the right to build its own water works.

We admit that it had this right, and have cited authorities to establish it, and also the authority to show its right to contract with the water company for the same service, but we contend that after it had induced the water company to make these large expenditures, upon the faith of the city's promise, and had made a contract which is now executed, it had no right to build opposition works and support the same at the public expense, thus compelling the water company to contribute the means for its own destruction, and render it possible for the city to buy the works, as it has the right to do, at a valuation which has thus been reduced, if not destroyed.

This question has been very thoroughly examined in the late case of White vs. the City of Meadville, decided by the Supreme Court of Pennsylvania, on October 5th, 1896.

"The borough of Meadville had under an Act of the Assembly 'at all times the unrestricted right to make and erect and maintain all proper water works, etc., or to make contracts and authorize any person, company or association to erect the proper water works, machinery,

etc., and give such person, company or association exclusive privilege to furnish water as aforesaid for any length of time not to exceed ten years. A subsequent section authorized the purchase by the city, at such price as may be agreed upon, of the rights, privileges and franchises of any water company, and to condemn the land and property for the construction of water works.' Here there plainly were two distinct methods by which the municipality could supply the citizens with water. There is no repugnance in the provisions of the two Acts. There will be decided repugnancy in their operation if both be put to work at the same time to effect that purpose. No community will pay double for any article of necessity or luxury. If the property holder must, by compulsory taxation, support the municipal system, he will not voluntarily support a private corporation system. Such a conflict of interest will inevitably bankrupt a company which depends upon the voluntary patronage of the public. We hesitate to assume—every court is bound to hesitate before assuming—that the legislature intended by grants to distinct corporations for public purposes that there shall arise such conflict in the exercise of the franchises as will result in practical destruction of the property of any citizen without compensation."

White vs. Meadville, 35 *Atlantic Rep.*, p. 695.

"We have decided in White vs. Meadville, on the construction of the Act of Assembly, the legislature never intended to commit the duty of supplying water to a municipality to two different agencies, both in operation at the same time. The borough had authority to provide a supply of water for the use of the inhabitants. This supply was provided by the Union Water Company, subject to such regulations in regard to streets, roads and grades as the borough imposed. The borough did not attempt to construct the water works until years after the water company had laid its mains and the public had been served. The rights of the water company vested by consent of the municipality and its contract to supply water for public purposes. The rights of the company are fixed by the Act of 29th April, 1874, under which it came into existence, and so are its obligations. If, as alleged, it fails to furnish a sufficient amount of pure water the courts are open to any complainant. After twenty years the borough had the power to purchase the works at price not exorbitant. We concur with the court be-

low in its findings of facts, but not in its conclusions of law as already noticed; therefore, the decree is reversed, and it is directed that an injunction issue restraining the borough of Beaver Falls and its officers from creating the proposed indebtedness of $123,000 for the construction of water works, or any part thereof. Further, that said defendants be enjoined from executing any contract for the construction of the proposed water works. Further, that the said borough and its officers be restrained from passing any ordinance, or doing any other act, matter or thing in furtherance of its purpose to increase its indebtedness to erect said water works."

Martin Metzgar vs. Borough of Beaver Falls, Supreme Court of Pennsylvania, January, 1897. (*Not yet reported.*)

III.

The third point in the demurrer is, that the city had no power to exempt the property from taxation.

This ordinance and contract does not undertake to grant an exemption from taxation as a gratuity or subsidy, but, as far as it appears from the facts stated, a full equivalent is given for the taxes in the supply of water to the public buildings, fountains, drinking places and twenty-five hydrants, for all of which the water is furnished without charge.

"Where an ordinance provided that in consideration of certain covenants by a water company to supply the city with water, its franchises and all property actually required for the management of its water works shall be exempt from taxation (municipal.) Such provision was not to exempt from taxation, but was in effect a payment of the taxes by the parties to the covenant on the part of the water company."

Grant vs. Davenport, 46 *Iowa*, 396.

> "It is within the constitutional authority of the Legislature to empower a city to exempt from taxation for a term of years property belonging to a water company, in consideration of the undertaking and agreement by the company to furnish free of cost to the city a supply of water for its public and municipal purposes."
>
> Portland vs. Water Company, 67 *Me.*, 135.

See also—

Jefferson Branch Bank vs. Skelly, 1 *Black*, 436.

New Jersey vs. Wilson, 7 *Cranch*, 164.

IV.

The fourth ground of demurrer is that this was an exclusive grant to the water company, and under the terms of the Constitution all such grants are revocable.

The words of the Constitution of Texas are, Section 17 of the Bill of Rights:

> "And no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or granted under its authority, shall be subject to the control thereof."

As we have seen, the Legislature granted to the City Water Company, a corporation of the State, a franchise creating it a corporation, and to it gave the right to use the streets of Austin for distributing water.

The Legislature granted to the city the power of assent or dissent, and also of regulation, and expressly gave it the right to provide the city with a water supply by erecting its own works or contracting for a supply with a water company.

If this delegation of powers to contract for a supply is good, it evidently gave the city such power and discretion as was reasonably necessary under all the exigencies of the matter contracted about, and this necessarily included the time for which, under the circumstances, the contract should be made, as well as the price of the water, and all these varied with whatever might be the surrounding circumstances.

If new water works were to be built to provide a supply, no one would build without a contract running such a length of time as would insure a reasonable return.

Such a contract, reasonable and fair in its terms, is not the grant of irrevocable or uncontrollable special privileges.

We have already stated that we do not contend that the *grant* was exclusive, except in the qualified manner hereinbefore stated, but this *contract*, fully executed as it has been by the water company, the Constitution of the United States protects from violation.

> "The power of the State, through her laws, etc., to protect the public cannot be relinquished, yet the State and its municipalities may make such contracts as will attain this end, and while the power must remain in the city or State to modify or release such contracts if they do not accomplish such purpose, neither the city nor State can be allowed to disregard or recall its contract upon mere caprice or to gain a pecuniary advantage."
>
> City of Louisville vs. Wible, 84 *Ky.*, 270.

> "Where the City Council was allowed discretion as to the method of supplying water, they exhausted their authority in making the contract with a water company, and the court protected it."
>
> Atlantic City Water Works, 39 *N. J. Eq.*, 367.

> "Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void in whole or in part, because of a want of power on the part of the cor-

poration to make it, or to enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable or unjust, and the contract is performed in whole or in part, by and on the part of the parties, and the other parties receive benefits by reason of such performance, over and above any equivalent rendered in return; and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity toward the other party, by either rescinding the contract and placing the other party in *statu quo*, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return, and all this should be done as nearly in accordance with the term of the contract as law and equity will permit."

Brown vs. City of Atchison, 17 *Pac. Rep.*, 465.

"The doctrine of *ultra vires* will be applied to the contracts of corporations only when such contracts remain wholly executory."

Thompson vs. Lambert, 44 *Iowa*, 239.

See also ante-pages of this brief.

V.

The fifth ground of defendants' demurrer is that the power of revocation contained in the Constitution was directly exercised by the grant of the Legislature of a new charter to the City of Austin.

If we are right in the position we have taken in answer to the last (IV) point, neither by the Constitution of the State, nor by the charter granted to the City, could this contract be violated.

The new charter to the City of Austin was not a revocation of any legislative power by virtue of which our contract was made.

VI.

The defendants say that the bondholders have a remedy at law.

The statement of our case alone is sufficient to answer this objection. The City has only undertaken, so far as the bondholders are concerned, to pay the water rental for interest on the bonds. Who is to pay for the value of our security thus destroyed? How can this value be estimated? No private purchaser could be found for these works, for who would purchase water works in a city where the city itself is a competitor for custom? In the language of the Meadville case already cited:

> "If the property holder must by compulsory taxation support the municipal system, he will not voluntarily support the private corporation system."

What is the value of these works which by the terms of the license the city has the right at any time to take possession of? The appraised value to-day is the price at which the city has a right to buy them. But if any other purchaser could be found, would he be willing to take these works with the full knowledge that the whole power of the city could be used to depreciate their value, and that at any time hereafter the city would have the right to take them from him at this depreciated value?

MOTION TO DISMISS APPEAL.

We submit that the motion to dismiss the appeal should be denied as being clearly without merit.

Paragraph 30 of the bill (Record pp. 21–2) distinctly alleges:

> "That the said ordinances were passed and adopted by the said city council of the said city of Austin, and approved by the said mayor of the city of Austin in violation of the provisions and inhibitions contained in section 10 of article 1 of the constitution of the United States;"

and paragraph 33 (Record pp. 23–4), with equal distinctness, alleges:

> "That the purpose, intent and effect of the said act of the legislature of the State of Texas was to impair the binding force and obligation of the said contracts * * * and that the said legislation was unlawful and in violation of the provisions and inhibitions contained in section 10 of article 1 of the constitution of the United States."

As the city ordinances were passed under supposed legislative authority, the jurisdiction of the federal court attaches exactly as in the case of a direct act of the legislature.

> Saginaw Gas Light Co. vs. City of Saginaw, 28 *Fed. Rep.*, 529.
>
> Weston vs. City of Charleston, 2 *Peters*, 462.
>
> Wright vs. Nagle, 101 *U. S.*, 791, 79
>
> Wo Lee vs. Hopkins, 118 *U. S.*, 356, 359.
>
> Hamilton Gas Light Company vs. Hamilton City, 146 *U. S.*, 258, 266.

Under section 5 of the Act of March 3, 1891, appeals or writs of error may be taken from the district or circuit courts direct to the Supreme Court, among other instances,

> "In any case that involves the construction or application of the Constitution of the United States," and also "In any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The paragraphs of the bill which we have above quoted show that this case comes directly within the terms of the Act authorizing appeals or writs of error to be taken to the Supreme Court.

In a case in which a federal law was claimed to be unconstitutional, this Court declared:

> "In order to bring a case within this clause of the Act, the Circuit Court must have construed the Constitution or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it."
>
> Cornell vs. Green, 163 *U. S.*, 75, 78.

Here we have a clear request to the Court to apply the constitutional provision against the impairment of contracts, and a distinct omission by the Court to make such application.

See decision of the Court of Appeals for the first circuit, in case of town of Westerly vs. Westerly Water Works. 76 *Federal Reptr.*, 467.

II.

The constitutional question gives to this Court jurisdiction, not of that question only, but of the entire case and of every question involved in it.

In Horner vs. United States, 143 *U. S.*, 570, 576, the law is thus laid down:

> "Where an appeal or writ of error is taken direct to this Court under section 5 of the Act of March 3, 1891, in a case in which the constitutionality of a law of the United States is drawn in question, this

Court acquires jurisdiction of the entire case and of all questions involved in it, and not merely of the question of the constitutionality of the law of the United States. This is shown by the fact that under section 5 when an appeal or writ of error is taken direct to this Court in a case in which the jurisdiction of the District Court or of the Circuit Court is in issue, it is specifically directed that 'the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision;' but there is no kindred limitation prescribed in regard to any of the other cases in which jurisdiction in this court of appeals or writs of error is given by section 5."

See also, to the same effect—

Chappel vs. United States, 160 *U. S.*, 509.
United States vs. Jahn, 155 *U. S.*, 112, 113.

SKIPWITH WILMER,
SAMUEL B. HUEY,
D. T. WATSON,
Solicitors for Appellants.

> When, by the contract of 1882, between the City of Austin and the City Water Company, the City provided an ample supply of water for its territory and people it exhausted its power in that respect, and could not, during the pendency of that supply, build its own water works.

We neglected to call the attention of the Court, as we should have done in our brief to an Act of the State of Texas, passed in 1875, which was in force when the water contract was made, and is still in force. See Revised Statutes of Texas for 1879, page 67, Article 374; also, the General Laws of Texas for 1875, page 126, Section 31.

That Statute was passed as a part of the delegation of power by the State to the Councils of the cities and towns of Texas, and, among other powers, it gave them as follows:

> "To provide, *or cause* to be provided, the City with water, to make, regulate and establish public wells, pumps and cisterns, hydrants and reservoirs in the streets, or elsewhere, within said City, or beyond the limits thereof, for the extinguishment of fires and the convenience of the inhabitants, and to prevent the unnecessary waste of water."

This Statute, read in connection with certain provisions of an Act of Texas, incorporating the City of Austin, approved April 5, 1873, and cited in the third paragraph of the Bill, seems clearly enough to give to the City of Austin the general power to provide a water supply for its people and property. How that water was to be supplied was, in the first place, left discretionary with the City.

It might, itself, directly provide it by the construction of water works, or it might, *indirectly* provide it by some other means, and one of the means distinctly designated by statute, and cited in the fifth paragraph of the Bill, was by contract with a corporation organized under State laws for that purpose.

The thing the City was authorized to do was to procure a water supply.

The *means* of procuring it, either by direct action of the City

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in constructing water works, OR by contracting with some other water corporation to furnish such supply, was left to the discretion of the City.

The power, however, was in the alternative. The City could either build the works itself, *or* could contract with some other water corporation to furnish the supply. The City could not, at one and the same time, *both* build the works *and* make a contract for the supply.

It was but *one* supply the City was authorized to procure. Only *one* supply would be beneficial or useful to the City. The authority given did not extend to *two* supplies, one of which would be unnecessary and useless.

When the City procured the one supply it exhausted its powers pending that supply, and during the time the supply was ample. Whichever mode the City elected to take to procure the supply necessarily prevented the procuration, by the City, of a double supply by some other mode, for it would be a useless waste of the money of the citizens to so do.

As it is admitted under the pleadings that the City of Austin did procure an ample supply of good water by its contract with the City Water Company, it could not, pending that contract and during the sufficiency of the supply, erect its own water works. In making the contract with the City Water Company it elected as to the mode in which it would secure the supply, and, having so elected, it prevented it, during the continuance of the contract, from erecting new works for another supply.

The City did not, by this contract, exclude itself from the future exercise of its police powers in case of necessity; and, in addition, the contract provided ample means by which the City could procure the water works at fair and reasonable terms.

The above views are directly supported by the decision of the Supreme Court of the States of Pennsylvania and New Jersey, and by the Circuit Court of the United States for the District of Washington and Illinois.

White vs. the City of Meadville, 177 *Pa. St.*, 643.
Metzgar vs. the Boro. of Beaver Falls, 178 *Pa.*, 1.

Atlantic City Water Works vs. Atlantic City, 39 *New Jersey Equity*, 367.

Atlantic City Water Company vs. Atlantic City, 48 *New Jersey*, 378.

Columbus Water Company vs. the City of Columbus, 48 *Kansas*, 99.

Walla Walla Water Company vs. the City of Walla Walla, 60 *Federal Reporter*, 659.

Illinois Trust and Savings Bank vs. the City of Arkansas, 76 *Federal Reporter*, 271.

SKIPWITH WILMER,
SAMUEL B. HUEY,
D. T. WATSON,
Solicitors for Appellants.

No. 285. 44.

Brief of Fisher for Appellee

Filed Mar. 22, 1897

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

Appeal From the Circuit Court of the United States, Western District of Texas.

PENN MUTUAL LIFE INSURANCE COMPANY ET AL.
vs.
THE CITY OF AUSTIN ET AL.
} NO. 285.

BRIEF FOR APPELLEES.

S. R. FISHER,
For Appellees.

HUTCHINGS PRINTING CO., AUSTIN.

In the Supreme Court of the United States.

Appeal From the Circuit Court of the United States, Western District of Texas.

PENN MUTUAL LIFE INSURANCE COMPANY ET AL.
vs.
THE CITY OF AUSTIN ET AL. } NO. 285.

The City of Austin and others, Appellees, move the Court to dismiss this appeal for want of jurisdiction of this Court to hear and determine the same, nothing appearing of record upon which its jurisdiction can be invoked. The appeal is direct from the Circuit Court and there is no fact apparent upon the face of the bill, or otherwise disclosed by the record, from or out of which the jurisdiction of this Court can arise.

S. R. FISHER,
For Appellees.

To

Counsel for Appellants.

Take notice that the above motion will be called up and submitted when the case is reached on the docket in its regular order.

S. R. FISHER,
For Appellees.

SUPREME COURT OF THE UNITED STATES.

Appeal From the Circuit Court of the United States, Western District of Texas.

PENN MUTUAL LIFE INSURANCE COMPANY ET AL.
vs.
THE CITY OF AUSTIN ET AL.

NO. 285.

BRIEF FOR APPELLEES.

In April, 1882, the City of Austin was, and since then has been, a city "having more than ten thousand inhabitants," operating under a special charter granted by the Legislature of Texas in 1873, amended in 1883. This act, declared to be a public act, contains the following, among other, provisions touching the powers of the Mayor and City Council:

"7th. To construct water works, gas works and street railroads within and beyond the city limits or both; to provide the city with water and gas and to erect hydrants, fire plugs and pumps in the streets; to erect the necessary machinery, lamp posts, etc., for lighting the city within or beyond the limits of the city for the convenience of the inhabitants of the city and environs.

10th. To provide for the lighting of the streets and erecting lamps thereon.

20th. To provide for the prevention and extinguishment of fires and organizing and establishing fire companies.

To enact all ordinances which shall be necessary and proper for carrying into effect the powers specified.

* * * To levy an annual tax, not exceeding one per cent. upon the property within the limits of the city made taxable by law for State and county purposes; the money raised by said tax to be used for the current expenses and general improvement of the city.

* * * To raise money on the credit of the city for a special and definite purpose by issuing bonds of the city or otherwise; provided, the bonded debt of the city shall not, at any time, exceed $125,000.00, and the interest due on bonds and interest bearing warrants issued by the city of Austin, with interest accrued thereon, shall be at all times considered a part of the bonded debt of the city. To extend the bonded debt of the city be-

yond $125,000.00 shall only be done by a special act of the Legislature, or by consent of two-thirds of the tax-paying citizens voting at an election held for the purpose, after thirty days notice by the mayor by the authority of and in the method that may be prescribed by the city council. The bonds shall specify for what purpose they were issued and, when any bonds are issued by the city a fund shall be provided to pay the interest, and two per cent. per annum on the principal as a sinking fund to redeem the bonds or pay them at maturity, and said sinking fund shall not be diverted to or drawn for any other purpose, and the city treasurer shall honor no draft drawn on said sinking fund except to pay the interest or redeem the bonds for which such fund was provided. The sinking fund for the redemption of any bonds and the payment of the interest thereon, shall be invested, as fast as the same accumulates in interest bearing bonds of the United States or of the State of Texas, or of the City of Austin as the council may deem advantageous; and such bonds and the interest thereon shall be sold when necessary to pay or redeem the bonds for which the sinking fund was established."

Subsequently, as stated in the bill, the city passed the several ordinances looking to the extension of the bonded debt of the city in the sum of $1,400,000.00, and took action looking to the construction and maintenance of its own system of water works and electric lights, and afterwards, on the 17th day of April, 1891, was granted a new charter by the Legislature, set out as an exhibit to complainants' bill of complaint. (Trans. 68.)

At the time of the making of the contract referred to in the bill, the present constitution, which was adopted in 1876, was in full force and effect. The following, among other provisions relating to municipal and private corporations, are contained therein:

* * * * "Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the Legislature, and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful for any one year, which shall exceed 2 1-2 per centum of the taxable property of such city and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per centum thereon. * * * * But no debt for any purpose shall ever be incurred, in any manner, by any city or county, unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least

two per centum as a sinking fund. (Secs. 5 and 7, Art. 11, Cons. 1876.)

"No private corporation shall be created except by general laws. Section 1, Article 12, constitution of 1876.

General laws shall be enacted providing for the creation of private corporations" * * (Section 2, article 12, Ib.)

The following provisions are also found in said instrument:

* * * * "And no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof. (Section 17, article 1, constitution.)

Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." * * (Section 26, article 1.)

The City Water Company and the Austin Water, Light and Power Company were both incorporated and organized under a general law of the State of Texas, approved April 23, 1874 (General Laws, 1874, pages 120, *et seq*). This law was carried forward into the Revised Statutes.

Among other provisions therein contained is the following:

"All charters or amendments of charters under the provision of this act shall be subject to the power of the Legislature to alter or reform or amend the same. (General Laws, 1874, page 123; New Revised Statutes, Art. 650.)

This law also contained the following provisions:

"Any gas or water corporations shall have full power to manufacture, and to sell, and to furnish such quantities of water or gas as may be required by the city, town or village where located, for public or private buildings, or for other purposes, and such corporation shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, alleys, lanes and squares in such city, town or village, with the consent of the municipal authorities thereof and under such regulations as they may prescribe (Section 59, General Laws, 1874, page 134; New Revised Statutes, article 705, old article 629); and

The municipal authorities of any city, town or village in which any gas light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, lots, lanes, squares and public buildings in any such city, town or village." (Section 60, General Laws 1874, page 135; New Revised Statutes, article 706, old article 630.)

With the facts as above stated, on the 3rd day of January, 1895, the appellants, in their capacity as bondholders of the City Water Company and of the Austin Water, Light and Power Company, its alleged successor, filed and exhibited in the Circuit Court of the United States for the Western district of Texas, their bill, praying an injunction against the City of Austin, its mayor, board of public works and other defendants, to restrain and perpetually enjoin the said City of Austin and other defendants from constructing and putting in operation a system of water works and electric lights.

Complainants alleged, in substance, that on the 13th of April, 1882, the City of Austin, made and entered into a contract with the City Water Company, a private corporation, incorporated under the general laws of the State (laws of 1874), whereby it conferred upon said company the right and privilege to lay pipes and water mains in the streets, alleys and public ways of the city, and obligated and bound itself to take water from the City Water Company, for a period of twenty years, for a stipulated price, to be paid therefor, and also authorized it for such period to furnish water to the inhabitants of said city at a price not to exceed a fixed limit.

Complainants alleged in effect that said contract—a copy of which was annexed to and made a part of the bill—was exclusive in its character, and that, during the continuance thereof, the city was without power or authority to contract for a water supply from any other source or sources, or to erect and maintain a plant of its own for the purpose of supplying its public wants and the wants of its inhabitants.

Complainants also claimed that, relying upon said contract and the benefits to be derived therefrom, the City Water Company and the Austin Water, Light and Power Company, its alleged successor, had invested large sums of money which would be lost, and the value of its plant entirely destroyed, or greatly deteriorated, should the city construct and maintain a system of water works of its own.

They also alleged that the City Water Company and its alleged successor, the Austin Water, Light and Power Company, in and by said contract, were granted an exemption from taxation during the entire period of said contract in consideration of the furnishing

to the city of a certain quantity of water free for certain designated public purposes.

Certain of the provisions of the charter of the City of Austin, of force and operative at the time of the execution of the alleged contract, were set out in the bill. The charters of the two water companies are not set out in the bill, nor are their powers anywhere enumerated; but, as they were both incorporated under the general law, it is clear that they can have and exercise such powers only as are authorized by the statute.

Complainants further charged that certain ordinances of the City of Austin authorizing and empowering the city council, upon obtaining the consent of the tax-paying citizens of Austin through an election held for such purpose, to issue bonds for the purpose of raising money with which to construct a system of water and electric light works, and the new charter granted the city by the Legislature in 1891—which ordinances and charter are annexed to and made part of said bill—impaired the obligation of the contract, and that said municipal ordinances and new charter were in conflict with section 10, article 1 of the Constitution of the United States.

The complainants moved for a preliminary injunction and, as is apparent from the note at the foot of the bill, an order was made by the Circuit judge appointing a day for hearing at New Orleans. (Trans. 33.) As matter of fact, the hearing at the time fixed was had, and after full argument, the preliminary injunction was denied on the ground that complainants' bill was without equity, and that the matters and facts complained of by them could be fully, completely and adequately remedied at law.

Subsequently, February 4, 1895, the defendants, appellees herein, demurred to said bill upon the following grounds:

* * * That said bill is without equity whatsoever, the matters and things therein complained of, if entitling complainants to relief of any kind, being cognizable in a court of law, and not in a court of equity—the said bill being wholly without equity. And these defendants say, and each of them says, that said bill is insufficient for the following, among other reasons:

First—Because the contract set out in complainants' bill is and ever has been void under the constitution and laws of the State of Texas, the City of Austin having no power under its charter or under the constitution and laws of the State of Texas, to enter into such contract.

Second—Because the City of Austin, at the time of making the alleged contract, had and now has express authority and power, under its charter and acts of incorporation to construct, build, maintain and operate a system of water and light works, and said right on the part of the city has been expressly adjudicated and determined by the Supreme Court of said State.

Third—Because the City of Austin has not now, and under the constitution and laws of the State of Texas, did not have at the date of the alleged contract, any power to exempt the property of the City Water Company or the Austin Water, Light and Power Company or any part thereof from taxation or commute taxes levied thereon, and the attempt so to do in said contract is and was void, and said city is now and was at the time of the alleged levy of said tax under obligation and required by the constitution and laws of said State, and the charter of said city, to impose taxes upon all alike, and it is not within the power of this or other court to exempt said property from taxation by enjoining the levy of taxes thereon, the constitution and laws requiring that taxation shall be uniform.

Fourth—Because even if said contract and the charter of the City Water Company and the Austin Water, Light and Power Company had in express terms sought to grant to or confer upon the City Water Company or the Austin Water, Light and Power Company the exclusive right to furnish the City of Austin and the inhabitants thereof, with water and light, or either, for public and private use, still, under the constitution and laws of Texas now in force and in force at the time of the making of said alleged contract and the granting of said charters, such exclusive privilege would have been subject to alteration, amendment or repeal by the Legislature.

Fifth—Because, prior to the making of said contract, the constitution of the State of Texas, adopted in 1876, in express terms provided, that no irrevocable or uncontrollable grant of special privileges or immunities should be made, and that all privileges and franchises granted by the Legislature, or created by its authority, should be subject to the control thereof, and these defendants say that, under and by virtue of an act of the Legislature of the State of Texas granting to the City of Austin a new charter, which is designated as Exhibit K in complainants' bill, express power and authority was granted to the City of Austin to issue bonds for the purpose of establishing and maintaining the system of water and light works now in course of construction by said city.

Sixth—Because if complainants have the right to sue for any alleged breach of said contract, such suit is not cognizable by and in a court of equity, that a plain, full and adequate remedy at law exists for any breach of the provisions of said contract which may result in damage to the complainants, and that

said contract, if valid, in express terms furnishes the measure of damage for any breach of the provisions thereof. For defendants say that, under the charter of said city, authority is given to annually assess and collect a tax of one per centum ad valorem on all property situated within said city for the purpose of paying for the current expenses and general improvement of the said city or its property and that such tax would be ample to meet and fully discharge any claim that complainants or said company might establish against said city as damages for the breach of said contract.

Seventh—Because there is nothing in said contract requiring the City of Austin to purchase the property and works of the City Water Company or the Austin Water, Light and Power Company. * * * * (Trans. 102.)

The demurrer coming on to be heard on the 8th day of March, 1895, in term time, the same was sustained by the Circuit Court, and complainants declining to amend the bill was dismissed and decree final entered on the ground that the bill was without equity. (Trans. 106.)

From this decree the complainants prayed and were allowed an appeal direct to this court. (Trans., 106.) The following is the only error assigned:

"And now come the appellants and assign error in this court, and say: The court erred in sustaining defendant's demurrer to complainants' bill of complaint on the ground that said bill is without equity and in dismissing said bill from the docket of the court." (Trans., 106.)

ARGUMENT:

The appellate jurisdiction of this court is limited and restricted to the class of cases specified in section 5 of the act of March 3, 1891, c. 517; and it is clear that its jurisdiction can not attach in this case unless the record discloses, (a) that the jurisdiction of the Circuit Court was in issue, or (b) that the constitution or a law of the State of Texas conflicts with appellants' contract and contravenes the Federal Constitution; in other words, it must affirmatively appear upon the face of complainants' bill that there was involved in this case a Federal question, the determination of which was essential to the correct decision of the case.

The first contention, that the jurisdiction of the Circuit Court was in issue, can not possibly be maintained; for it is evident that the Circuit Court had jurisdiction, by reason of the diverse citi-

zenship of the parties, and that it exercised jurisdiction without question, hearing and sustaining a demurrer to the bill and dismissing the same for want of equity. This gave right of appeal to the Circuit Court of Appeals, but not to this court.

In *Smith vs. McKay*, it is said: "When the requisite citizenship of the parties appears and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches and whether the court should sustain the complainants' prayer for equitable relief or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction it could only be remedied by an appeal to the Circuit Court of Appeals." (161 U. S., 355.)

The position that the action of the Circuit Court in entertaining jurisdiction of an equity bill and in not dismissing it for want of equity, or in sustaining a demurrer to a bill and dismissing it for want of equity, puts in issue the jurisdiction of the Circuit Court under clause 1 of section 5 of the act of March 3, 1891, is no longer open to question. The rule now is that, if the Circuit Court had jurisdiction of the parties and of the matters in dispute, the fact that it is contended that it had no jurisdiction on its equity side raises no question of jurisdiction within the meaning of the act and whether a case has been made out by the plaintiff in equity or at law is not sufficient to put in issue the jurisdiction of the court in the sense in which that phrase is used in the judiciary act. In the case just cited, the record disclosed that the defendants below appealed to this court upon the express ground that the Circuit Court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction and prayed that their appeal should be allowed and the question of jurisdiction certified to the Supreme Court, which was done.

In determining whether the record disclosed a case in which the jurisdiction of the Circuit Court was in issue, in the sense in which that phrase is used in the judiciary act, this court, through Mr. Justice Shiras, said:

"The question thus raised has never been directly decided by this court. It did present itself in the World's Columbian Exposition case, 18 U. S. App., 42. This was a case in which the Circuit Court of the United States for the Northern District of Illinois had granted, at the suit of the United States, an injunc-

tion against the World's Columbian Exposition, a corporation of the State of Illinois, restraining the defendant from opening the exposition grounds or buildings to the public on Sunday. From this decree an appeal was taken to the Circuit Court of Appeals for the Seventh circuit and that court, speaking through Chief Justice Fuller presiding, stated and discussed the question as follows: 'The appellees have submitted a motion to dismiss the appeal upon the ground that the jurisdiction of the Circuit Court was in issue; that the case involved the construction or application of the Constitution of the United States; that the constitutionality of laws of the United States were drawn in question therein; that therefore the appeal from a final decree would lie to the Supreme Court of the United States and not to this court, and hence that this appeal, which is from an interlocutory order can not be maintained under the seventh section of the judiciary act of March 3, 1891. We do not understand that the power of the Circuit Court to hear and determine the cause was denied, but that the appellants contended that the United States had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of equity and not the want of power. The jurisdiction of the Circuit Court was therefore not in issue within the intent and meaning of the act.'

We regard this as a sound exposition of the law and applied to the case now in hand it demands a dismissal of the appeal on the ground that the objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in the complainants' bill. The appellants' contention in this respect would require us to entertain an appeal from the Circuit Court in every case in equity in which the defendant should choose to file a demurrer to the bill on the ground that there was a remedy at law." (161 U. S.)

But, even in the absence of this construction of the statute, the appellants could not invoke the jurisdiction of this court, under the first clause of section 5 of the act referred to, for the reason that the question of jurisdiction was not certified as imperatively required by the law. (Maynard vs. Hecht, 151 U. S., 324; Colvin vs. Jacksonville, 157 U. S., 368; United States vs. Jahn, 155 U. S., 109; Van Wagenen vs. Sewall, 160 U. S., 369; Chappel vs. U. S., 160 U. S., 499 and 507; Davis vs. Geisler, 162 U. S., 290.)

In this case, requisite citizenship and subject matter being sufficient to give the Circuit Court jurisdiction without reference to the presence of a Federal question, and the court having heard and determined the case upon its merits as any other equity cause that might come before it, without it appearing that a

Federal question was presented to, or ruled upon by the trial court, or entered into, or in any wise affected, the ruling disposing of the case, it would seem that the appeal in this instance was taken to revise the correctness of the judgment of the court in the exercise of its ordinary jurisdiction. This, as ruled in Cornell vs. Green, 163 U. S., 75, is not sufficient to invoke the jurisdiction of this court and the appeal should be dismissed without instituting an inquiry for the purpose of determining whether or not there was present a question of a federal nature upon which also the jurisdiction of the circuit court might have been founded.

If, however, this view be incorrect as applied to an appeal from a judgment or decree of a Circuit Court of the United States, then appellants are driven to the position that the case in the Circuit Court involved a Federal question in such way as to invoke and call for the exercise of jurisdiction by that court.

We proceed then to inquire whether complainants' bill discloses a Federal question.

Where it is sought to invoke the protection of the constitution against the impairment by subsequent legislation of any right, privilege or immunity claimed under a contract relied upon by complainants it must affirmatively appear, upon the face of their pleadings and from the facts alleged, that the legislation subsequently enacted by the State, or under its authority, will have the effect charged, and further that the determination of the question is essential to the correct disposition of the case. It will not be sufficient that a Federal question is incorporated into the record, if not essential to the jurisdiction and to a correct disposition of the case. Even if jurisdiction of the Circuit Court had been invoked on the sole ground that the case involved a Federal question, yet if the case could be disposed of without reference to the Federal question upon other grounds, it is submitted that such a case would not present a case to which the jurisdiction of this court would extend, but that the appeal would lie to the Circuit Court of Appeals and could only reach this court, if at all, from that court. Again, the Federal question must be evolved logically from the facts alleged. A mere naked statement that the legislation complained of impairs the obligation of a contract will not be sufficient. It is a mere statement of a legal conclusion and the court will look to the bill,

every fact alleged, and the constitution and laws of the State, in force and operative at the time of its making, to determine the existence or non-existence of a Federal question, also whether it was presented to and decided by the Circuit Court, and further whether its decision was essential to the correct disposition of the cause.

In *Starin vs. City of New York*, it is said:

"The character of a case is determined by the questions involved. Osborn vs. Bank, 9 Wheat, 738-824. If, from the questions, it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States within the meaning of that term as used in the act of 1875, otherwise not. Such is the effect of the decisions on this subject. Cohens vs. Virginia, 6 Wheat, 264, 379; Osborne vs. Bank, 9 Wheat, 138-824; Mayor vs. Cooper, 6 Wall, 252; Water Company vs. Keys, 96 U. S., 190-201; Tennessee vs. Davis, 100 U. S., 257-264; Ry. Co. vs. Mississippi, 102 U. S., 135-140; Ames vs. Kansas, 111 U. S., 449-462; Kansas Pacific Co. vs. Atchison, etc. Ry., 112 U. S., 414-416; Society vs. Ford, 114 U. S., 635-641; Pacific Railroad Removal Cases, 115 U. S., 1; see, too, German Insurance Co. vs. Winconsin, 119 U. S., 473; Carson vs. Dunham, 121 U. S., 421." (115 U. S., 257.)

In *Tennessee vs. Union and Planters' Bank*, this court, through Mr. Justice Gray, in determining whether or not the Circuit Court of the United States had jurisdiction, either original or by removal, of a suit as one arising under the constitution, laws or treaties of the United States unless that fact appeared by plaintiff's statement of his own claim, used this language:

"Even under the act of 1875, the jurisdiction of the Circuit Court of the United States could not be sustained over a suit originally brought in that court, upon the ground that the suit was one arising under the constitution, laws or treaties of the United States, unless that appeared in the plaintiff's statement of his own claim. This was distinctly adjudged, and the reasons clearly stated, in Metcalf vs. Watertown, 128 U. S., 586, 589, in which Mr. Justice Harlan, after pointing out that the cases, in which it had been held sufficient that the Federal question upon which the case depended was first presented by the answer or plea of the defendant, were cases of removal, in which, therefore, the requisite jurisdiction appeared on the record at the time when the jurisdiction of the Circuit Court of the United States

attached, said: 'Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance.'" (152 U. S., 460, 461.)

In *Cornell vs. Green*, it was held that, in order to bring a case within the appellate jurisdiction of this court upon the ground that the case involves the construction or application of the Constitution of the United States, the Circuit Court must have construed the constitution or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it. No construction or application of the constitution can be said to have been invoked in the court below when no construction or application thereof was either expressed or asked for. (163 U. S., 78.)

In *Ansbro vs. U. S.*, it is said:

"A case may be said to involve the construction or application of the constitution of the United States when a title, right, privilege or immunity is claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. An assignment of errors can not be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give this court jurisdiction under the fifth section of the act of March 3, 1891." (159 U. S., 697, 698.) See also Borgmeyer vs. Idler, 159 U. S., 400; Carey vs. Ry. Co., 150 U. S., 170; in re Lennon, 150 U. S., 395; Northern Pacific Ry. Co. vs. Amato, 144 U. S., 465-472; Sayward vs. Denny, 158 U. S., 180; Colorado Mining Co. vs. Turck, 150 U. S., 138; U. S. vs. American Bell Telephone Co., 159 U. S., 550 et seq.

In *New Orleans vs. Banjamin*, where the jurisdiction of the Circuit Court was invoked on two grounds: (1). That the case was one arising under the constitution of the United States; and (2), on diverse citizenship, the court said:

"When a suit does not really and substantially involve a dis-

pute or controversy as to the effect or construction of the constitution, upon the determination of which the result depends, then it is not a suit arising under the constitution. Shreveport vs. Cole, 129 U. S., 36; Starin vs. New York, 115 U. S., 248, 257; Gold Washing and Water Co. vs. Keyes, 96 U. S., 199.

The judicial power extends to all cases in law and equity arising under the constitution, but these are cases actually and not potentially arising, and jurisdiction can not be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the constitution is to be passed upon by the State courts in the first instance, the presumption being, in all cases, that they will do what the constitution and laws of the United States require, Chicago and Alton Railway Co. vs. Wiggins Ferry Co., 108 U. S., 18; and if there be ground for complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes. Congress gave its construction to that part of the constitution by the twenty-fifth section of the judiciary act of 1789, and has adhered to it in subsequent legislation." (153 U. S., 424.)

In *City of Fergus Falls vs. Fergus Falls Water Company*, decided by the Circuit Court of Appeals for the Eighth Circuit, Fergus Falls Water Company brought an action against the City of Fergus Falls upon a contract. It alleged in its complaint that the city made a contract to pay certain water rents for supplying the city with water; that it had complied with the contract and furnished the water, that the city had paid the rents until its city council passed a resolution that the contract was annulled and cancelled, and that it would no longer pay rents thereunder; that, from the date of the passage of that resolution, the city had not paid the rents, and that the resolution was a law impairing the obligation of a contract. It was held, first, that the allegation that the resolution was a law impairing the obligation of the contract was surplusage; and, second, that even if the averments of the complaint had brought the case within the jurisdiction of the Circuit Court, the suit should have been dismissed when it appeared upon the trial, as it clearly did, that the suit did not arise under the constitution and no Federal question was involved, but only the question whether the city had authority under the laws

of Minnesota to enter into the contract in suit. In the progress of the opinion, Caldwell, Circuit judge, said:

"The defendant challenged the jurisdiction of the Circuit Court at every stage of the case, and that is the only question we find it necessary to consider. The jurisdiction is attempted to be maintained upon the ground that the case is one arising under the constitution of the United States. But clearly this is not so. The complaint shows the suit to be one to recover for water furnished by the plaintiff to the city under the contract set out in the complaint. In a word, it is a suit to recover for the breach of an alleged contract to pay for water. It does not differ in any respect from a suit to recover for water supplied to a private consumer. It is in no wise different from a suit brought by one individual or private corporation against another individual or private corporation to recover for fuel, merchandise, or other property alleged to have been sold and delivered by the one to the other under a contract to pay a stipulated price therefor. In all such cases the cause of action is not grounded on any right derived from the constitution of the United States, but arises out of the contract between the parties. The right to contract and the obligation of contracts antedate the constitution, and were not derived from it. An action, therefore, to recover upon the contract in suit, or to enforce its obligation, is not a suit arising under the constitution. But it is said that the complaint sets up that the defendant, by resolution of its council, declared the contract null and void, and is in contravention of the constitution of the United States. Conceding all this to be so, it does not serve to make the plaintiff's cause of action one arising under the constitution. Notwithstanding this averment, it is indisputable that the complaint shows the plaintiff's suit is based upon and arises out of, the contract in suit, and not under the constitution." (72 Fed. Rep., 874, 875.)

Applying these well recognized principles to the case at bar and it would seem clear that the case it not a case arising under the constitution of the United States, that no question of a Federal nature is involved, and certainly that the legislation complained of, the municipal ordinances passed under the authority of the Legislature and the new charter, in no wise impairs the obligation of the contract relied upon; in other words, that appellants have no contract falling within the constitutional inhibition against impairment of contract obligation, the contract not being exclusive in its character and imposing upon the City of Austin no obligation to refrain from the construction and maintenance of wa-

ter works or from entering into a contract with some other company or companies for the furnishing of water. (Nalle vs. City of Austin, 85 Texas, 520; Long vs. Duluth, 51 N. W., 913; Syracuse Water Co. vs. City of Syracuse, 116 N. Y., 167; Rockland Water Co. vs. Camden, etc. Water Co., Maine, 1 L. R. A., 388.) The case does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution upon the determination of which the result of the suit depends. Exclusiveness of the contract would seem to be absolutely essential and necessary to the existence of a Federal question within the contract provision of the constitution; that is, the contract, if one within the competency of the city to make, must, in order to fall within the protection of the constitution, be exclusive to the extent of conferring upon the City Water Company and, if assignable, its successor, the exclusive right or privilege of maintaining its mains and pipes in the streets and public ways, and the exclusive right or privilege of furnishing water to the city, and its inhabitants during the entire period of the contract. The contract, by its terms, is not exclusive, and this court will not so construe it unless the city had the power to make an exclusive contract, and not then in the absence of explicit provisions to that effect in the contract itself. (Charles River Bridge vs. Warren Bridge, 11 Pet., 420; Stein vs. Bienville Water Supply Co., 141 U. S., 67; Turnpike Co. vs. City, 3 Wall, 210; Hamilton Gas, etc. Co. vs. Hamilton, 146 U. S., 258; Saginaw Gas Light Co. vs. Saginaw, 28 Fed. Rep., 531; Re Brooklyn, 143 N. Y., 596; s. c., 26 L. R. A., 273; Syracuse Water Co. vs. City of Syracuse, 116 N. Y., 167; s. c., 5 L. R. A., 551; Brenham vs. Brenham Water Co., 67 Texas, 542; Long vs. Duluth, Minn., 51 N. W. Rep. 913; State vs. Cincinnati Gas, etc. Co., 18 Ohio St., 262; Norwich Gas Co. vs. Norwich City Gas Co., 26 Conn., 19.)

Rockland etc. Water Co. v. Camden etc. Co. (Maine) 1 L.R.A. 394, 396.

The charter of the City of Austin did not authorize its council to make an exclusive contract with the City Water Company or to grant it an exclusive franchise. The charter of the City Water Company did not confer upon it an exclusive franchise to furnish water to the City of Austin and its inhabitants, the charter conferring upon the Water Company only such powers as were conferred by the general law upon water companies, and the right to an exclusive privilege is not given in the general law. Besides, the constitution and laws of the State of Texas, in force

Rockland etc. Water Co. v. Camden etc. Co. 1 L.R.A. 388, 394; Lehigh Water Co. v. Easton, 121 U.S. 391; Jackson Co. Horse Ry. Co. v. Interstate Ry. Co. 24 Fed. rep. 306)

at the time said City Water Company was incorporated and at the time the contract was made, forbade the granting of an exclusive franchise or contract of this character. (Brenham vs. Brenham Water Works, 67 Texas, 542; Altgelt vs. San Antonio, 81 Texas, 436; Nalle vs. City of Austin, 85 Texas, 520, 549.)

If it be assumed that the contract is valid, or valid as to some of its provisions, it is apparent that the obligation imposed by the contract upon the city is simply that the city shall pay a specified rental, for a certain number of hydrants, during a given period, and not that the city may not, if it so elect, at any time, either before or after the limit named, construct and maintain water works of its own or grant the privilege to other parties. (Nalle vs. City of Austin, 85 Texas, 522, 547, 548; Long vs. Duluth, 51 N. W., 913; Syracuse Water Co. vs. Syracuse, 116 N. Y., 167; Turnpike Co. vs. City, 3 Wall, 210; Hamilton, etc. Co. vs. Hamilton, 146 U. S., 258; 69 Fed. Rep., 671, 672.)

But, if the contract should or could be held to be exclusive, then, by express adjudications of the Supreme Court of Texas, in Brenham vs. Brenham Water Works, 67 Texas, 542; in Altgelt vs. City of San Antonio, 81 Texas, 436, and in Nalle vs. City of Austin, 85 Texas, 520, the contract is absolutely void, if not *in toto*, certainly so far as its exclusive feature is concerned. These decisions were made by the Supreme Court of Texas in passing upon and determining the powers, under the constitution and laws of Texas, of its municipal corporations, whether operating under charters similar to the charter of the City of Austin or under the general law. They show a construction, by the Supreme Court of Texas, of its local laws conferring powers upon municipal corporations, and also a construction and application of the constitution of the State to such laws and contracts made thereunder. (Claiborne vs. Brooks, 111 U. S., 400, 410; Detroit vs. Osborne, 135 U. S., 492, 497.) The contract involved in the Brenham case was almost identical in terms with the contract here exhibited, and the court there distinctly held that the contract was void, because the city was vested with no express power under its charter to grant an exclusive privilege, because a contract of such character was in legal effect a monopoly, beyond the power even of the Legislature to make, and because it was beyond the power of the city to make a contract that would disable it, in future, from con-

trolling, as it might deem best, its municipal affairs. This ruling was adhered to in the Altgelt case. In the Nalle case, which was a suit by a tax-payer to enjoin the collection of the tax assessed and levied for the purpose of paying interest upon the water works bonds issued under the ordinances herein assailed, the complainant, as one of the grounds for the relief he sought, alleged that, at the time of the passage of the ordinances for the election and issue of the bonds by the city, it had a contract (the very contract here relied on) with a private corporation, by which it was provided with an adequate supply of light and water, and that said corporation was able and willing to carry out its contract and to supply all the light and water which the necessities of the city required. It was insisted that, by such contract, the city had exhausted its power to procure water and light from any other source. The Supreme Court, in answering this contention, said:

"It seems to us the statement of the proposition carries with it its own refutation. In this state, no city can grant an exclusive right to furnish either the water or lights. Brenham vs. Water Company, 67 Texas, 544. The argument comes down to this that, whenever a city has made a contract with a company able and willing to supply it with the necessary water and lights—terminable it may be at the city's option and burdensome in its terms—its power is exhausted and any attempt to procure water and light from any other means is *ultra vires* and void." (85 Texas, 549, 550.)

The court further distinctly ruled that the power of the City of Austin, to construct and maintain a system of water and light works was fully conferred and that the power in this case had been properly exercised.

These decisions, it is submitted, are binding upon and will be followed by this court, although it might, if exercising its independent judgment in their absence, decide differently. (Claiborne vs. Brooks, 111 U. S., 400, 410; Detroit vs. Osborne, 135 U. S., 492, 497, 498, 499; Flash vs. Conn, 109 U. S., 371; 144 U. S., 408, 422; Dupont vs. Pittsburg, 69 Fed. Rep., 13; N. Y. L. E. etc. Ry. Co. vs. Pennsylvania, 158 U. S., 435; Laredo Imp. Co. vs. Stevenson, 16 Fed. Rep., 632; Elmwood Township vs. Marsey, 92 U. S., 289, 294; Fairfield vs. Gallatin Co., 100 U. S., 47 ½; Louisiana vs. Pilsbury, 105 U. S., 278, 294; Randall vs. Brigham, 7 Wall. 523;

Ottawa vs. Perkins, 94 U. S., 260; Post vs. Kendall Co., 105 U. S., 667; Carroll Co. vs. United States, 18 Wall, 71, 82; Smith vs. Kernochen, 7 How. 198, 219.)

In *Claiborne County vs. Brooks*, it was said:

"It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State." (111 U. S., 410.)

In *Detroit vs. Osborne*, the court quoted, with approval, the above extract and further said:

"If it is a matter of local law, that law is obligatory upon the Federal courts. It must be conceded that this adjudication * * * is not in harmony with the general rule in this country, * * * nor in accord with the views expressed by this court. * * * But, even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that State. Whatever our views may be as to the reasoning or conclusion of that court, is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts, and all its citizens, and all others who may come within the limits of the State. The question presented by it is not one of general commercial law; it is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the State. While this court has been strenuous to uphold the supremacy of Federal Law, and the intepretation placed upon it by the Federal courts, it has been equally strenuous to uphold the decisions by State courts of questions of purely local law." (135 U. S., 497, 498.)

Again, if the contract be exclusive, then, without reference to whether it created a monopoly under section 26, article 1, Cons. 1876, it would be void under section 17 of said article, declaring that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof." This provision prohibited any

grant of an exclusive or special privilege by the Legislature, or under its authority, and if the city, nevertheless, attempted to confer such a privilege it would be within the power of the Legislature, or of the municipality exercising a part of its delegated sovereignty, to withdraw such special or exclusive privilege. This, it is submitted, was done when the city passed the legislation complained of, and if this were not sufficient, certainly the granting the new charter by the Legislature in 1891, conferring, in express terms, upon the city the right to construct, maintain and operate the present system of water works, authorized under the challenged ordinances, would have such effect. (Par. 46, sec. 57, char., Trans. 87.) If the contract was and is void, either in its entirety or as to the exclusive feature, then there was no contract to create an obligation and, therefore, no obligation which could be impaired by any subsequent legislation.

It is to be observed, in this connection, that the City Water Company, the Austin Water, Light and Power Company, its alleged successor, and the City of Austin; all derived their powers from the Legislature, through enactments and articles of incorporation made under and subject to the authority of the constitution of 1876, which was of force and operative when it is claimed that the City Water Company and the city undertook to contract for a water supply for the city and its inhabitants; and if the act of the city, in attempting to confer upon the Water Company the privilege, for a long term of years, of furnishing the city and its inhabitants with water, was the act of the State, through the city as its legally appointed agent, and such privilege was intended to be exclusive of the right of the city, through works of its own, or otherwise, to make other arrangements for a further supply, but the ordinances of the city complained of can not be held to be an exercise of the reserved power of the Legislature to revoke or control the privilege conferred—then, it is submitted, that the act of the Legislature of 1891, granting to the city a new charter and expressly conferring upon it the right to "erect, construct, build and operate a water and electric light system to supply the city and its inhabitants with water and electric light by constructing and maintaining a reservoir of water in and about the channel of the Colorado river, within and without the city limits, by erecting a dam across the same where such dam is now being constructed,

to serve as a reservoir and to furnish power to operate an electric light system and to build such other reservoir as may be necessary * * * to supply the higher portions of the city with water" * * * —unquestionably operated as and was a revocation of any exclusive or special privilege granted to the City Water Company, or its alleged successor, and conferred upon the City of Austin, as it might have conferred upon any other company or person, the right and power to erect, maintain and operate a rival system of water works. This, it would seem, was a clear exercise by the Legislature of its constitutional power, and impaired no obligation arising out of the contract.

This view seems to be in entire harmony with the decision of this court in *Hamilton Gas Light Co. vs. Hamilton City.* There the gas company, upon an attempt by the city to construct its own gas works, invoked against an ordinance of the city the protection of the impairment clause of the Federal Constitution, and also the clause declaring that no State shall deprive any person of property without due process of law, and it became necessary for this court to examine and pass upon certain provisions of the constitution of Ohio, of force when the company's charter was extended, similar to section 17 of article 1 of the Texas Constitution, above quoted. It was held that these provisions conferred upon the Legislature the power to alter or revoke an exclusive privilege, and that the exercise of such power could not be held to impair the obligation of a charter constituting a contract, which must be deemed to have been accepted subject to the reservation of power to alter or revoke.

The court, through Mr. Justice Harlan, said:

"By the constitution of Ohio, adopted in 1851, it was declared that 'no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly;' that the 'general assembly shall pass no special act conferring corporate powers;' and that 'corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.' Sec. 2, Art. 1; Secs. 1, 2, Art. 13. If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of law, of supplying gas-light to the City of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion that such a grant, as respects, at least, its exclusive character, was subject to the

power of the Legislature, reserved by the State constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute, providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privilege, can not be regarded as one impairing the obligation of the contract, whatever may be the motive of the Legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation." (146 U. S., 269, 270.)

It is further submitted that allegation of failure on the part of the city to take water from the City Water Company is nothing more nor less than an allegation of a breach of contract, for which the party aggrieved would be entitled to have his appropriate remedy, but such action on the part of the city would not bring the contract within the protection of the constitution—it would present no Federal question. The fact that the city, whatever its motives, has, during the life of the contract, constructed and maintains a rival system of water and light works, the effect of which may be to greatly deteriorate or damage the operative value of the property of the City Water Company and decrease its revenues, would present no Federal question. (13 Wall, 68, 70; 146 U. S., 268; 3 Wall, 210-213.) Such conduct on the part of the city might, perhaps, present facts giving rise to an estoppel *in pais* and the Water Company might, in a proper case, be entitled to relief, but this, it is submitted, would simply present a matter of ordinary cognizance by a court which, if tried in the Circuit Court of the United States, would be appealable to the Circuit Court of Appeals; it would involve merely a matter of ordinary jurisprudence and would, in no sense, present a Federal question that could be the foundation of the jurisdiction of this court. Nor would the failure of the city to exercise its option to purchase the plant and property of the City Water Company, under the provisions of the contract, before itself proceeding to construct and maintain its own plant, present any such question, nothing in the contract binding the city to buy the Water Com-

pany's property—the option to buy imposing no obligation. (Syracuse Water Co. vs. Syracuse, 116 N. Y., 167, 187; Colby University vs. Canandaigua et al., 69 Fed. Rep., 671, 672.)

II.

If, however, the court is of opinion that it has jurisdiction, it is insisted that the decree is correct and should be affirmed.

The objections urged against the contract on the motion to dismiss—all of which are confidently relied upon—will not be gone over, but some additional matters, apparent upon the face of the bill and to which the demurrer applies, will be presented against the validity and binding force of the contract; among them, the tax exemption provision, the assignability of the contract, the effect of the transfer by the City Water Company, in 1887, to the Austin Water, Light and Power Company, of all its properties, rights, franchises, privileges, etc., and the abandonment by it, from and after that time, of the purpose for which it was incorporated.

The exemption from taxation provided for in the contract, or rather the commutation of taxes for water, is and ever has been utterly void under the constitution of Texas, (Austin vs. Gas Co., 69 Texas, 180; Altgeld vs. City of San Antonio, 81 Texas, 436) and being an interpretation of the constitution of Texas and of the charter of the City of Austin is binding here. The decision is in line with similar decisions in other states, and is so manifestly correct that it would seem not to require the support of authorities. (City of New Orleans vs. New Orleans Water Works Co, 36 La. Ann. 432; City vs. Lafeyette Ins. Co., 28 La. Ann. 756; La. Cotton Mfg. Co. vs. City, 31 La. Ann., 440; Brewer Brick Co. vs. Brewer, 62 Me., 62; S. C., 16 Am. Rep., 395; State vs. Hannibal, etc., R. C., 75 Mo., 209; Cartersville Water Works vs. Cartersville, 89 Ga., 689.) It is clear that all of the allegations of the bill relative to the contract for lighting the city, which contract the bill shows had expired before the filing thereof, are irelevant to any issue in this cause, and if complainants were, in any manner, entitled to an exemption from taxation, it would be upon only so much of the property of the City Water Company as was necessarily and exclusively used for the purpose of carrying out the water contract, and further, if the exemption from taxation could, in any way, inure to the benefit of the City Water Company, it was personal to

that company, and would not pass by assignment or transfer. (Chesapeake and Ohio Ry. Co. vs. Miller, 114 U. S., 176; Morgan vs. Louisiana, 93 U. S., 217; R. R. Co. vs. Pendleton, 156 U. S., 667, 673; Picard vs. R. R. Co., 130 U. S., 637; 112 U. S., 609.)

As already shown, the city had abundant authority, at the time of entering into this contract, to construct and maintain water works of its own, but under the law such works could only be constructed out of revenues of the city to be derived from taxation specially levied for that purpose. If, therefore, the contract with the City Water Company was not exclusive and if, notwithstanding that contract, the City of Austin had the power and authority to establish a rival water company, so that its inhabitants might purchase water from whomsoever they might choose, then the City Water Company necessarily took its contract subject to the contingency that the city, in the exercise of its power, would tax the property of the City Water Company as if it were the property of any other citizen, and the exemption sought to be granted by the contract being absolutely void, the City Water Company was charged with legal notice of its nullity, and can not now get the benefit of it, either directly or indirectly; because, if a municipal corporation is prohibited by the organic law from bartering away its taxing power, directly or indirectly, there is no form or kind of agreement or estoppel by which the constitutional prohibition could be rendered inoperative and no kind of equity, which would practically amount to an annulment of the constitutional provision, could be generated that a court could enforce. We submit that this proposition is too clear to need authorities to support it.

It further appears, from distinct and affirmative allegations in the bill (Par. 21, Trans. 14) and from the exhibits annexed to and made part thereof, (Trans. 50 to 57) that, in 1887, the City Water Company, with whom the city dealt in the matter of the contract here relied upon, sold, transferred, set over and surrendered to the Austin Water, Light and Power Company all its properties rights, powers, franchises and privileges, including its entire plant and structure as a water works, and thereafter ceased to perform any of the functions for which it was incorporated or to carry out or perform any of the obligations imposed upon it under the said contract. (Par. 23, Trans. 16.) As heretofore stated, the powers of the City Water Company and of the

Austin Water, Light and Power Company are not specifically set out, but they were incorporated under the general laws and have only such powers as are authorized by statute to be conferred and exercised. The power to transfer and set over to another corporation or person all the property, powers, privileges and franchises necessary and essential to carry out the purposes of the grant thereby disabling itself from further exercising its functions, did not exist and could not, if so attempted, be granted to it by the City of Austin, by original authorization or subsequent ratification. The City Water Company had no authority to make the transfer, and the Austin Water, Light and Power Company had no authority to receive it. A corporation, created to supply water to the inhabitants of a city under the general incorporation laws, is subject to control by the State in the same manner and to the same extent as railroad corporations. The business of such a corporation is a public one, affecting the general welfare and interests of the whole community in which the company seeks to do business; and, in recognition of the public nature of the enterprise, such corporations can lawfully be given, and in Texas are given, the right to exercise the power of eminent domain. Any transfer by such a corporation, as was attempted by the City Water Company in this case, of its public privileges and franchises is utterly void, whether made by lease, sale or otherwise, and such attempted transfer not only conveys no title, but in addition gives ground for forfeiture of the charter of the corporation so attempting to convey. (See City Water Company vs. State of Texas, *ex rel.* Frank Hamilton, 33 S. W., 259; see, also, G. C. & S. F. Ry. Co. vs. Morris, 67 Texas, 692; East Line and Red River R. R. Co. vs. State of Texas, 75 Texas, 434; Thomas vs. Ry. Co., 101 U. S., 71; Gibbs vs. Gas Co., 130 U. S., 397; Chicago Gas Co. vs. Gas Light Co., 2 Ann. St. Rep., 124; S. C., 121 Ill., 530.) In fact it appears, from the reported decisions of the Supreme Court of Texas, that the City Water Company—with whom the contract here is alleged to have been made—was, before the filing of this bill, proceeded against by the State of Texas, and its charter forfeited, because of the transfer aforesaid to the Austin Water, Light and Power Company, whereby it incapacitated itself from carrying out the purpose of its incorporation, which was the supplying of the City of Austin and its inhabitants with

water for public and private purposes. It is, therefore, contended that the Austin Water, Light and Power Company got no title to this contract, and the City of Austin not being the sovereign power could not, in any manner, consent to a violation of a public law of the State of Texas on this subject, and that, however much it may have recognized the Austin Water, Light and Power Company, such recognitions can have no force or validity against the effect of the public law of the State. The dissolution of the City Water Company, organized for a public purpose, carried with it a destruction of all its franchises and rights of a public nature, and left it a concern in liquidation, for its assets to be disposed of for account of whom it may concern, and the bondholders, complainants here, who hold their rights subject to the charter and to the existence of the City Water Company, can not have any greater right than has the City Water Company itself. The bondholders of the Austin Water, Light and Power Company can not, in any event, have any greater rights than had the corporation under which it holds, and as no title to this franchise and contract could be conveyed by the City Water Company to the Austin Water, Light and Power Company, such bondholders are without any standing in court, either at law or in equity.

In *City Water Company vs. State*, supra, the court, in rendering judgment affirming the judgment of forfeiture of the charter of the City Water Company, said:

"This is a proceeding, in the nature of a *quo warranto*, in which a judgment was rendered forfeiting the charter of the City Water Company. * * * * * The action of the trial court in overruling appellant's plea in abatement, urging that a receiver previously appointed by another court, and in possession of appellant's tangible property, was a necessary party to this suit, is the only question about which any member of this court had any doubts. We certified that question, and the Supreme Court held that said receiver was not a necessary party. (32 S. W., 1033.) On the other questions involved, the court below filed conclusions of fact and of law. The former are acquiesced in by the parties and adopted by us. The latter are disputed by appellant, but we think they are correct, and here insert them as expressing our views, viz.:

1. That, while it is true the said City Water Company comes within the class denominated by our statutes as private corporations, its business and the purposes for which it was incorporated are of such public character as to make it a quasi public corpora-

tion, subject to be governed by the rules of law applicable to such corporations. (Foster vs. Fowler, 60 Pa. St., 27; Lumbard vs. Stearns, 4 Cush, 62; Burden vs. Stein, 27 Ala., 104; Kane vs. Mayor, etc., of Baltimore, 15 Md., 240; Gardner vs. Village of Newburgh, 2 Johns. Ch., 162; Wayland vs. Commissioners, 4 Gray, 500; Haugen vs. Water Co., Or., 28 Pac., 246; Mor. Priv. Corp., secs., 1114, 1129; I Beach Corp, secs. 2, 3; Waterworks vs. Schottler, 110 U. S., 354, 4 Sup. Ct., 48; Gibbs vs. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553; City of Rushville vs. Rushville Natural Gas Co., Ind. Sup., 28 N. E., 856; Rev. St. arts. 629, 630; Acts 22d. Leg. Assem. p. 172.)

2. That the failure to elect directors or officers, or hold any meetings of directors or officers, or perform any corporate act, for nearly eight years, and the attempted sale and surrender of all its property to another corporation, rendering itself incapable of performing its corporate duties, must be regarded as willful violations of corporate duties, and sufficient grounds to entitle the State to a forfeiture of its charter. (State vs. Southern Pac. Ry. Co., 24 Tex., 131; 4 Am. and Eng. Enc. Law, 304; Railway Co. vs. Morris, 67 Tex., 692; 4 S. W., 156; East Line and R. Co. vs. State, 75 Tex., 434, 12 S. W., 690.)

3. The fact that the Austin Water, Light and Power Company is furnishing the citizens of Austin and vicinity with water, as the pretended successor to the City Water Company, can not be held to deprive the State of the right to forfeit the charter of the City Water Company for willfully failing to perform its corporate duties, and wilfully attempting to sell all its corporate property, and delivering the possession of same to the pretended purchaser, which disabled it to perform the duties it owed to the public.

4. That under the facts of this case, the charter of the City Water Company ought to be declared forfeited, and judgment will be rendered for the plaintiff accordingly. No reversible error has been pointed out, and the judgment will be affirmed."

An application was afterwards made by the respondent, the City Water Company, to the Supreme Court of Texas for a writ of error to reverse the judgment of forfeiture. It was refused. (See list of cases in which writs of error were denied, in the list published in 33 S. W. on page xvii preceding page 1.) This stamps the judgment of forfeiture with the approval of the Supreme Court.

The carefully considered and learned opinion of the Court of Appeals of New York in the case of *Syracuse Water Co. vs. City of Syracuse*, 116 New York, bears so directly upon the questions involved that liberal quotation therefrom will be made.

Actions were brought by the Syracuse Water Company against the City of Syracuse and against the city and the Central City Water Works Company to restrain the city from granting to the Central City Water Works Company the right to place pipes or other structures in the City of Syracuse with a view to supply it with water, and for the purpose also of restraining the city and the Central Water Works Company from exercising any right or privilege which the city, through its council, had by resolution sought to give to the defendant company and which the latter had assumed to take.

The actions rested upon the charge made by the plaintiff that the defendants were proceeding to invade its rights, which it claimed were founded upon the possession by it of an exclusive right or franchise to furnish the city with water.

In disposing of this claim adversely to the plaintiff and denying the injunction, the court said:

"* * * The plaintiff was incorporated by laws of 1849, chap. 224, and ever since then it has furnished water to the city and its inhabitants. To do that was the purpose of its creation, and it was fully provided by its charter with the powers essential to that service, amongst which was that of eminent domain. The franchise granted to the plaintiff embraced all the powers, privileges and immunities within the charter, and constituted a contract between the State and the plaintiff, and in the exercise of the powers so granted the latter was entitled to protection. It follows that if within the franchise, granted by the State to the plaintiff, was the exclusive right to supply the City of Syracuse with water, the defendants should be enjoined from proceeding, as they are attempting to proceed, to interfere with or impair such right. (St. Tammany Water Works vs. New Orleans Water Works, 120 U. S., 64; New Orleans Gas Light Co. vs. Louisiana Light and Heat Co., 115 U. S. 650; New Orleans Water Works Co. vs. Rivers, 115 U. S., 674; Louisville Gas Co. vs. Citizens Gaslight Co., 115 U. S., 683.) * * * * * *

The company evidently was created solely for the purpose of supplying water to the city for the use of it and its inhabitants; and, so far as appears, the city then had no means for such supply other than such as had been possessed by Teall and his associates, and such as it may have been contemplated the plaintiff would provide. It must be assumed that the Legislature was advised of the situation, and that the franchise was granted for all the purposes within the provisions of the charter.

* * * The construction and effect to be given to the contract between the State and the grantee of a franchise have been

the subject of much discussion, and the view of Chancellor Kent at one time was that although 'the creation of the franchise be not exclusive, yet it is necessarily implied in the grant, as in the case of the grant of a ferry, bridge or turnpike or railroad, that the government will not either directly or indirectly interfere with it so as to destroy or materially impair its value. * * * All grants or franchises ought to be so construed as to give them due effect by excluding all contiguous competition which would be injurious and operate fradulently upon the grant.' (3 Kent, 459; Newburgh and C. Turnp. Co. vs. Miller, 5 Johns. Ch., 101.)

Whatever support that rule of interpretation and effect may have in reason or propriety, it is not now available to that extent for the beneficial protection of the grantee in the exercise of his franchise, but on the contrary, public grants are to be so strictly construed as to operate as a surrender of them by the sovereignty no further than is expressly declared by the language employed for the purpose of their creation. The grantee takes nothing in that respect by inference. Such is deemed the legal intent of the State in imparting to its citizens or corporations powers and privileges of public charter. And, therefore except so far as they are by the terms of the grant made exclusive, the power is reserved to grant and permit the exercise of competing and rival powers and privileges, however injurious they may be to those taken by the prior grantee.

The important leading case to that effect in this country was Charles River Bridge vs. Warren Bridge, 11 Pet., 420, where was sustained the grant of the right to erect a bridge over the Charles river near one which had been constructed over the same river pursuant to prior grant from the State of Massachusetts, although it produced a competition practically destructive of the value to the grantee of such prior franchise. And this was put upon the ground, resulting from the declared rule of construction of such grants, that they should be strictly construed as against the grantee, and that nothing should be taken by inference or presumption to enlarge their import. The court held that the State had relinquished its sovereignty so far only as the purpose to do so was expressed in the prior grant, and therefore as it had not by it made the franchise exclusive in that locality or denied to itself the power to grant similar privileges to others, there was no violation of the legal rights of the prior grantee produced by the subsequent one complained of. Although that case was determined by a divided court, and it does not very clearly appear by the report of it upon precisely what ground all the members of the majority placed their concurrence in the result, the doctrine there announced by Mr. Chief Justice Taney has since then been treated by that court as established. (Lehigh Water Co. vs. Easton, 121 U. S., 391.)

* * The plaintiff's charter does not in terms expressly de-

clare that the contemplated powers and privileges to supply water to the city were exclusively with the plaintiff, nor does it in that manner deny to the State the right to make other similar grants for that purpose. And the same may be said of the acts of 1821, 1825 and 1834, through which the plaintiff, by the conveyance to it, claims to have derived some rights in that respect. The plaintiff undoubtedly took, by such conveyance, all the privileges and property which Teall possessed for the purpose of furnishing such supply, with the power, added by its charter, of taking water from any suitable sources; and to enable it to do so, it was vested with the right of eminent domain. These several statutes must be treated *in pari materia* with a view to their purpose and effect, and to ascertain the rights taken by the plaintiff through them.

When the trustees, representing the unincorporated and the incorporated Village of Syracuse, and subsequently when Teall, assumed the power pursuant to the statute to furnish water, there was no other means of supply in contemplation, and such evidently was the situation when the plaintiff took its charter and became vested, by the conveyance, with all the rights and property then existing applicable and applied to that purpose. Upon the faith of that apparent situation, Teall, and afterwards the plaintiff, proceeded to provide the means to supply water to the municipality and its inhabitants, and in that behalf expended much money in the plant for its accomplishment. It is therefore, with some force urged that these are considerations bearing upon the practical construction of the relation between the plaintiff and the city, produced by the statutes and the proceedings had under them, which disable the latter from denying to the plaintiff, in any manner otherwise than that prescribed by the statute, the right exclusively to continue to supply water there. And much reliance is by the plaintiff's counsel placed upon the sixteenth section of its charter, which required the plaintiff, when requested, to furnish water to the common council of the city for extinguishing fires and other purposes. This provision was made available by request pursuant to it in April, 1851, and afterwards contracts to supply water for certain periods were made between the plaintiff and the common council. The request was an acceptance of the obligation imposed so far as the statute rendered it essential to the exercise by the plaintiff of the franchise granted to it.

It is contended that the request, in view of the duty imposed upon the plaintiff, was productive of a contract between it and the city, perpetual and interminable, while the plaintiff retained its franchise and other property having relation to its exercise. While the request may have made the grant to the plaintiff effectual for the purpose provided by the statute, we think the plaintiff is not entitled upon any contract between it and the

city to the equitable relief sought, but it must depend upon the contract between it and the State furnished by the grant aided, so far as it legitimately may be, by the consideration to which such request may be entitled as bearing upon the operation and effect of the grant. The municipal corporation, as such, could bind itself by such contract only as it was authorized by statute to make. It could not grant exclusive privileges especially to put in mains, pipes and hydrants in its streets, nor could it lawfully by contract deny to itself the right to exercise the legislative powers vested in its common council. It can not well be claimed that any express power was delegated to the municipality to grant any exclusive franchises; and public policy will not permit the inference of authority to make a contract inconsistent with the continuously operative duty to make such by-laws, rules and regulations as the public interest or welfare of the city may require. (Milhau vs. Sharp, 27 N. Y., 611; New York vs. Second Ave. R. Co., 32 N. Y., 261; Richmond County Gaslight Co. vs. Middletown, 59 N. Y., 228; Gale vs. Kalamazoo, 23 Mich, 344; Logan vs. Paine, 43 Iowa, 524; Des Moines Gas Co. vs. Des Moines, 47 Iowa, 505; Norwich Gas Light Co. vs. Norwich City Gas Co., 25 Conn., 19.)

Reference has already been made to the provision of the city charter conferring upon it power to make by-laws, rules and regulations in relation to certain matters, including those of prevention of fire and of supplying water. And it may be observed that, in 1857, by an act amendatory of the city charter it was provided that the common council should 'have power to make, establish, publish, modify, ordain, amend or repeal ordinances, rules, regulations and by-laws' for the purpose, among others, 'to light the streets and public buildings of the city and to supply the city with water.' * * *

While the city may make contracts and assume obligations for legitimate purposes and become liable for failure to observe them, it is not consistent with the discretionary powers which the common council may be required to exercise in the discharge of their duty to the public, which they represent, for them to grant, by contract, exclusive privileges having the character of perpetuity. There is no such contract between the city and the plaintiff to support the claim for an injunction against the city. Further than that it is unnecessary to determine what contractual relations between them arose out of the request referred to, or what was its character, duration or effect. Nor is it necessary to add that the facts found by the trial court upon the subject of performance by the plaintiff would justify the denial of an injunction, if the claim for it were dependent upon a mere executory contract between those parties. In dealing with municipal corporations, parties are chargeable with knowledge of their powers as they are furnished only by statute. It is therefore not seen, upon the

facts of this case, that the actions were aided by any disability of the defendant city occasioned by estoppel *in pais.* * * * *

It may be assumed that what is embraced within the terms of the grant to the plaintiff is exclusive in such sense that it can not be covered by grant to another. That is to say a grant from a State to a company to construct and operate a bridge, ferry or telegraph gives to it the exclusive right to operate such ferry, bridge or telegraph, and no right can be given or taken to occupy the same space as the one so constructed or operated under the grant. The property in the company to that extent, and for such purpose exclusively belongs to it; but a similar franchise may not infringe such right although it may have the effect to impair its operative value. In such case, that would be the incidental consequence of the lawful competition and not an invasion of the prior grant. (Lehigh Water Co. App., 102 Pa. 515.) * * *

The effect of rival means for the supply of water to the city, upon the value of plaintiff's franchise, is not properly the subject of consideration upon this inquiry unless it bear upon the question of construction of its charter, for which purpose it does not seem important. The plaintiff's structure belonged to it exclusively, and it is its exclusive right to take water from its reservoirs, convey it through its mains and pipes, and to use its apparatus for the distribution and supply of water to the city and its inhabitants. The franchise of the plaintiff and all its property remain subject to its control and management. By force of the grant to it, the plaintiff took and has the right to maintain its structure, the privilege of supplying all the water the city or its inhabitants may take from it, but not the right to supply them with all the water they may be permitted to use. It may be that the demand upon it for supply will be lessened by the addition of other means which may be provided to bring water into the city. The supply embraced within the franchise of the plaintiff did not, by the terms of the grant or by necessary implication, shut out all other means of obtaining supply there. And in view of the demand of the rule of construction before referred to, such exclusive right in the grant of a public franchise can not rest upon inference, presumption or doubtful construction.

It, is, however, urged that the city can avail itself of no means other than through the plaintiff to obtain any water supply except by resuming and taking its property and powers in the manner prescribed in one of the sections, 26 and 29 of plaintiff's charter, to which reference has already been made. It appears that these provisions were inserted in the charter at the suggestion or request of the common council of the city. And that was evidently done to enable it, in the event referred to in

the one, and on the expiration of the time mentioned in the other section, if the interests of the city should require it, to take the matter of its water supply into its own management and control * * * It simply gave the city the opportunity in the events provided, to become possessed of the property which would constitute the plant of the plaintiff and be applied to the service of furnishing water to the city. This right was not made a legal duty upon the performance of which was dependent the power to use means other than through the plaintiff to obtain further means of water supply for the city. It was a privilege merely which it might or might not exercise at pleasure. * * * The defendant company has taken its charter from the State through the general act of the Legislature. Its powers enable it to enter into contract to furnish water to the city. The proposed contract does not, in terms, confer upon it any exclusive right to supply water to the city. It, therefore, violates no right which the plaintiff took by its grant from the State; and it was within the power of both defendants to make such a contract. * * *

These views lead to the conclusion that the obligation of the contract between the State and the plaintiff, represented by the franchise granted to the latter, is not and will not be impaired by the exercise by the defendant company of the privileges granted to it in the performance of the proposed contract between the two defendants." (116 N. Y., 167, 173, 189; S. C., 5 L. R. A., 516, 551.) See also Rockland Water Co. v. Camden etc. Co. (Maine) 1 L.R.A. 394; High on Inj. § 902.

The question, what is or is not an exclusive privilege and whether it can rest upon implication or must be conferred in express terms, was again before the Court of Appeals of New York *In Re* Brooklyn, 143 N. Y., 596, and the decision in the Syracuse case approved. The court said:

"In the Syracuse Water Company case it appeared that that company had been incorporated for the purpose of supplying water to the City of Syracuse and its inhabitants, and that that was the only means for such supply possessed by the city. It was claimed that its franchise conferred an exclusive right which would be invaded if the City Central Water Works Company, with which the City of Syracuse had contracted to furnish the city with water was permitted to exercise the privilege granted by the contract. The latter company was incorporated under the general act and this court, in its second division, held that the obligation of the contract between the state and the plaintiff represented by the franchise granted to the latter was not impaired by the exercise by the defendant company of the privilege granted to it in the performance of the proposed contract. Judge

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who delivered the opinion of the court, reviewed the
of the plaintiff's right in the light of adjudged cases,
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erefore submitted that the allegations of the bill state
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Syracuse Water Co. vs. Syracuse, 116 N. Y., 167;
Long, Minn., 51 N. W., 913; Re Brooklyn, 143 N. Y.,
s. City of Austin, 85 Texas, 520; See also Turnpike
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Rockland Water Company etc. Co. (Maine) 1 L.R.A. 388, 394; 24 Fed. Rep. 306, 28 High on Inj. § 902

l should be dismissed or the decree affirmed.

S. R. FISHER.
For Appellees.

No. 285. 44.

Add'l Brief of Fisher for Appellees

Filed Apr. 12, 1897

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

Appeal From the Circuit Court of the United States, Western District of Texas.

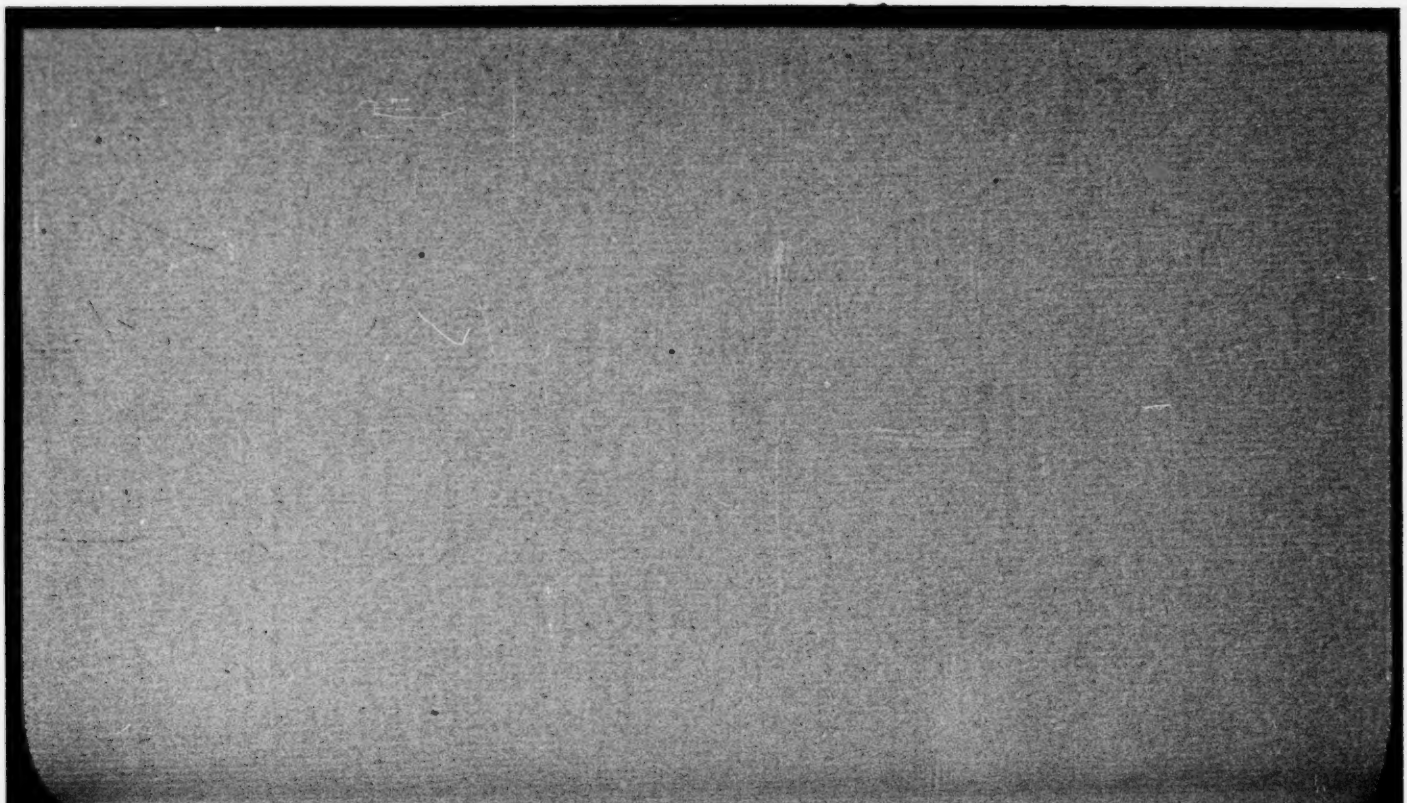
PENN MUTUAL LIFE INSURANCE COMPANY ET AL.
vs.
THE CITY OF AUSTIN ET AL.

NO. 285.

ADDITIONAL BRIEF FOR APPELLEES.

S. R. FISHER,
For Appellees.

HUTCHINGS PRINTING CO., AUSTIN.



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In further support of the contention that complainants are entitled to no relief in equity, it is respectfully insisted that the record discloses such laches on their part as to bar their right, if it ever existed, to relief by injunction. It affirmatively appears, from the bill and exhibits annexed thereto, that the City of Austin, through its taxpayers and council, took action as early as 1890 looking to the construction of a system of water and light works, to be put in operation immediately upon its completion without reference to the existence or non-existence of a contract for water supply with the City Water Company or other persons or corporation. It also appears therefrom that the money required to construct, complete and put in operation such a system as was contemplated, was $1,400,000.00, or some such large sum, and that it was to be raised by the issuance and sale of negotiable, interest-bearing bonds of the city, for the payment of the interest and sinking fund of which provision was made for the levy and collection of a special tax. The bill distinctly charges that the city and its officers, without reference to and in open disregard of the contract alleged to exist between the city and the Water company, had proceeded and were proceeding with the enterprise; that the city had already expended large sums of money in the construction of a dam across the Colorado river and that, in the further prosecution of the work,

it had entered into contracts requiring the expenditure of other large sums of money. Further it alleged, that the municipal authorities were actively engaged in laying pipes in the streets of the city, for the distribution of water for its use and that of its inhabitants, and that it was their purpose to press the construction of the works to a speedy completion and to maintain and operate a rival system (par. 36, Trans. 25). It is thus plain, that the construction of the system of water works by the city involved the expenditure of large sums of money; and it is fair to assume that, at the time the injunction was sought, the city had advanced a long ways towards the end in view, and had expended in the construction of its plant the greater part of the money it was thus authorized to expend. The averments, in substance, are that the dam had been completed at the expenditure of a large sum, that pipes were being laid, and that the works were nearing and being pressed to a speedy completion. As stated, it is apparent, from an inspection of the bill and the ordinances and charter of the city annexed thereto, that the money, necessary for the construction of works by the city, was required to be raised and was raised from the sale of negotiable bonds, and, as very large sums of money had been expended prior to the filing of the bill, it is but fair and reasonable to conclude that the bonds, from the sale of which the money was realized, were outstanding in the hands of innocent third parties. If complainants at any time had right to relief by injunction, and that right had been enforced at the inception of the enterprise and before the expenditure of large sums of money, no harm might have been done, but to grant such relief now would bring ruin to the people of the City of Austin, and irreparable injury to her welfare. Under these circumstances, it is submitted, that the laches of the complainants is clear, and that a court of equity will not extend relief. A court of equity requires reasonable diligence on the part of those seeking its aid and discourages laches by making it a bar to relief; therefore, a complainant on filing his bill for injunction must make it appear that he has used reasonable diligence in invoking the aid of the court, otherwise the relief will be denied.

"Nothing," said this court in *Brown v. County of Buena Vista*, 95 U. S., 160, "can call forth a court of equity into activity, but conscience, good faith and reasonable diligence. Where these

are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced and, therefore, from the beginning of this jurisdiction there was always a limitation of suits in this court." See also Foster v. Mansfield, etc., R. R. 146 U. S., 88, 100; Ware v. Galveston City Company, 146 U. S., 102, 115; Ranger v. City of New Orleans, 2 Woods, 143; Riverton Ferry Co. v. McKeesport & B. Co., 36 Atl. Rep., 136; City of Logansport v. Uhl, 99 Ind., 531, s. c. 50 Am. Rep. 109; Atty. Gen. v. N. Y., etc., R. Co., 24 N. J. Eq., 49; Traphagen v. Jersey City, 29 N. J. E[illegible] 206; 2 Pom. Eq. sec. 817.

In *Attorney General* [illegible] *v. N. Y. etc. Ry. Co.*, it was held that where the construction [illegible] an important public work has been permitted to proceed almost to completion, in full view of all the parties that could be affected thereby, and large expenditures have been made and liability incurred, and no action is taken to prevent the progress of the work for more than fourteen months, a Court of Chancery would not enjoin the further prosecution of the work.

In the case of *Traphagen v. Jersey City*, it was further held that where a suitor seeks to have a public improvement enjoined, he must not only show that some rights secured to him have been violated, and that he has no other adequate remedy, but he must also apply promptly, and that where by his laches he has made it impossible for the court to enjoin his adversary without inflicting great injury upon him, an injunction will be refused, and he will be left to pursue his ordinary remedy at law.

As heretofore urged, it would seem clear, if the contract relied upon be not wholly void, that complainants have a full, complete and adequate remedy at law; but it is further insisted that, if complainants desired to negative the existence of an adequate remedy at law, it devolved upon them to allege facts showing or tending to show the inadequacy of such relief by alleging the insolvency of the defendant city, or its inability to respond to any demand that might be made upon it for damages resulting from breach of the contract. There is in the bill no allegation that the defendant city is insolvent, or not able, by the exercise of its taxing power, to discharge any demand resulting from breach of contract which may be estab-

lished against it. It would seem to be essential that the complainants should have alleged that the city was insolvent or that, after taking into consideration its municipal expenditures and liabilities, its taxable values and the amount of money that might be realized from the tax authorized to be levied and collected, it would be in no condition to meet any demand growing out of a breach of the contract. Neither the amount of the taxable values of the city nor the amount of its current or other expenses is given, so that the court, by referring to the taxing power of the city, might determine whether or not it had the ability to discharge any damage that might result from breach of the contract.

An examination of the cases relied upon by complainants, where jurisdiction of the Circuit Court was sustained on the ground that a Federal question was involved and relief by injunction accorded, will disclose, either. (1) That the contract or franchise under consideration was, in its terms, exclusive, and made by a State or municipality having the power to make an exclusive contract or to grant an exclusive franchise, and where no right was reserved in the grantor to revoke, modify or control the same by subsequent legislation; or (2) That the contract, made by a municipality having the power to make it, imposed in express terms an obligation on it not to do the thing sought to be enjoined, and which if done would result in irreparable injury or loss.

All the other cases, cited as bearing upon the questions here involved, were either actions at law seeking the recovery of hydrant rental, or proceedings to compel the levy and collection of a tax to pay the same, in which the city, while not seeking to establish works of its own or to contract with a rival company, was atempting to interpose against the demand for the value, or the contract price, of water furnished, the defense of *ultra vires* upon the ground that the contract was an exclusive one beyond the power of the city to make, or that it ran for a longer term of years than was authorized by law, or for some like reason, or were decisions by State courts construing local statutes; and, hence, are not authority for the contention that the complainants have a contract imposing upon the defendant

city an obligation not to exercise its power to construct and maintain water works of its own, and which entitles them to relief by injunction.

White v. City of Meadville et al., 177 Pa. St., 643, s. c. 35 Atl. Rep., 695, affords no support to complainants. That case involved a construction by the Supreme Court of Pennsylvania of the statutes of that State relating to the powers of water corporations and the powers of cities of the third class as to water supply. It distinctly shows that the ruling of the court was founded upon what it deemed the legislative intent in enacting the corporation act of April 29, 1874, as to the powers and franchises of water corporations organized thereunder, and the act of May 23, 1874, relating to municipal corporations. It simply held that, construing these two statutes together as statutes *in pari materia*, a city of the third class, in Pennsylvania, had the power to supply itself with water (1) by the erection and maintenance of a system of its own, or (2) by contract with a water company for the erection of a water works plant—said company then to have the exclusive right, under the law, to furnish water to the city, subject to certain conditions as to purchase. Further it was held, that the city, as to the method to be pursued for obtaining a water supply, was put to its election, and that, after having elected to supply itself by contract with a water corporation, it could not, under the law of that State, operate and maintain water works of its own in competition with the party with whom it had contracted. In short, the court held that, under the Pennsylvania statutes regulating the subject, a city of the third-class had the power to supply itself with water through works of its own, or by contract with a water company, but that it could not do both at the same time. The distinction between the Pennsylvania case and this case would seem to be obvious. But, if there should be entire agreement between the facts of that case and of this one, the decision of the Supreme Court of Texas in *Nalle v. City of Austin*, 85 Texas, 520, to the effect that the City of Austin had the power to erect and maintain its own water works, notwithstanding the existence of a contract with a water company, would seem to control.

In *Walla Walla Water Company v. City of Walla Walla et al.*, 60 Fed. Rep., 957, the water company having a contract with the

city sought to enjoin the city from proceeding to construct and erect works of its own. The charter of the city, granted to it in 1883 by special act of the Legislature, conferred upon it the following among other powers: * * * To erect and maintain water works, within or without the city limits, or to authorize the erection of same for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water * * and to enact all ordinances and regulations necessary to carry the powers therein conferred into effect. * * To condemn and appropriate so much private property as shall be necessary for the construction and operation of such water works and * * * to purchase or condemn water works already erected or which may be erected * *. To provide a sufficient supply of water and to levy and collect special taxes for these purposes * * *. To grant the right to use the streets of said city, to any person or association of persons, for a term not exceeding twenty-five years, for the purpose of laying gas or other pipes intended to furnish the inhabitants of said city with light or water; provided, always, that none of the rights or privileges granted should be exclusive nor prevent the council from granting the same rights to others. * *

In 1887, the city, pursuant to an ordinance authorizing the same, entered into a contract with the water company by which it was authorized to lay pipes in the streets of the city for conducting water and required to supply water for the use of the city for the extinguishment of fire, flushing gutters and all other municipal purposes for a period of twenty-five years. The contract expressly stipulated: "* * * * And this contract is voidable by the city of Walla Walla so far as it requires the payment of money upon the judgment of a court of competent jurisdiction whenever there shall be a substantial failure of such supply or a substantial failure on the part of the water company to keep or perform any agreement or covenant on its part herein specified or in this contract herein contained * * * and, until this contract has been avoided, the City of Walla Walla will not erect, maintain or become interested in any works except the one herein referred to save as hereinafter specified. Neither the existence of this contract nor the passage of ordinance Number 270 shall be construed to be or be a waiver of or relinquishment of any right of the city to take, condemn and pay

for the water rights and works of said company or any company at any time. * * * *." The water company on its part fully complied with all the requirements of the contract.

In 1893, an ordinance was passed providing for the creation of water works and the laying of pipes by the city, for supplying the city and its inhabitants with water, and for issuing bonds to provide the necessary funds for such purpose. The city, without providing for the condemnation or purchase of the works of the water company, proposed to erect its own plant and to become its competitor in the business of supplying the city and its inhabitants with water.

The water company sought an injunction on the ground that the action of the city, in passing the ordinance aforesaid and in proceeding thereunder to establish and maintain a system of water works of its own, would impair the obligation of the contract between it and the city. The injunction was granted, the court holding that, under the powers conferred upon the city of Walla Walla, it had authority to make the contract with the complainant, and that it had therein bound itself and expressly stipulated that it would not, during the period the contract was to run, undertake to supply itself and its inhabitants with water, unless it should first exercise its right to buy or condemn the water works of the complainant.

It does not affirmatively appear that the charter, in express terms, prohibited the city of Walla Walla from making a contract which would exclude it from exercising its right to construct and maintain a system of its own. The language is indefinite, and the prohibition against exclusiveness would seem to be explicit only in respect of any person or persons other than the city; however, the city expressly agreed not to erect water works and become a competitor of the water company during the period of the contract, unless it should exercise the right or power given to purchase or condemn the works. This, the court held, created an obligation within the protection of the contract clause of the constitution. The decision is not satisfactory in its reasoning, and does not seem to be in harmony with the current of authorities; but, it is submitted, that the case is clearly distinguishable from the one under consideration. The city of Walla Walla, by its charter, was given express authority to grant the right to any person or association of persons to lay pipes in the streets

of the city, for the purpose of furnishing water, for a term of twenty-five years—such right, however, not to be exclusive of the right of the city to grant a similar privilege to any other person. The charter, if not affirmatively authorizing, did not in terms prohibit the city from excluding itself, during the term of the contract, from exercising its power to erect works of its own, and, as shown, the city had expressly stipulated that it would not, during the period of the contract, erect, maintain or become interested in, any water works, except those of the water company with which it had the contract, and not with its works except in the manner specified, which was by condemnation or by purchase.

Westerly Water Works v. Town of Westerly, 75 Fed. Rep., 101, was a suit instituted in the Circuit Court of the United States to enjoin the town of Westerly from constructing and operating a system of water works. The town was authorized to construct water works and also to contract with third parties for a water supply. It adopted the latter course and granted to the complainant the right to construct water works and supply the town on certain conditions. After the complainant had constructed an adequate plant and was prepared to comply with its contract in all essentials, the town passed a vote to itself construct a water works plant. An injunction was granted upon the ground that the action of the city would impair the obligation of the contract.

The court held that the power to grant an exclusive privilege, except upon certain conditions, did not exist, that such conditions were not present in the contract of the complainant, and that such contract was not exclusive—and yet held that such non-exclusive contract could, in effect, be made exclusive by giving to it all the benefits and privileges that could attach to an exclusive contract expressly authorized by law. The decision seems to be rested mainly on the authority of the case of Walla Walla Water Company v. City of Walla Walla, supra. But as already shown, that case does not sustain the decision. It did not decide, that a non-exclusive contract could raise against the city an obligation not to engage in the business of furnishing water where it already had a contract for such purpose with a corporation. It simply decided, that the city of Walla Walla had express authority to make a contract for laying pipes and fur-

*This decision is in direct conflict with Smith *vs.* Town of Westerly, 35 Atl. Rep., 526, decided by the supreme court of Rhode Island.

nishing water for a period not to exceed twenty-five years; that it had authority by contract to bind itself not to engage, as a competitor with the water company with whom it had contracted, in the business of furnishing water to the city and its inhabitants during the period the contract was to run; and that it had expressly agreed by contract that it would not, during such period, become a competitor of the water company. Further, in the Westerly case the court, although distinctly recognizing the fact that its charter gave to the town of Westerly the power, without words of limitation or restriction on its exercise, to construct water works and the power to contract for a water supply, nevertheless held that, when the town entered into the contract with the water company to supply water for a term of years, its power to maintain and operate water works of its own, during such period, was suspended. It is respectfully submitted, that this case stands alone, that it does not correctly declare the law, and that it is not supported by the authorities to which it refers. ※

Columbus Water Co. v. Mayor, etc. of Columbus, 48 Kansas, 99, s. c. 15 L. R. A., 354, was an application for a writ of mandamus to compel the city to levy a tax to pay hydrant rental under a contract between the water company and the city.

The court, on demurrer to the petition, held, in substance: That, in Kansas, a city of the second-class had the power to enter into a contract with private parties or a corporation for water to be furnished to it for fire protection; that, when such a city had entered into a contract and there had been erected and maintained, at great expense, for a period of four years or more, a water works plant, and during that period the corporation owning the plant had furnished water in accordance with the contract entered into and recognized by the city—the city having levied the proper tax and paid the hydrant rental for three years and otherwise recognized the validity of the contract—the contract would not be held void because the city did not possess the power to make a contract for a period of twenty-one years.

The city itself was not attempting to erect and maintain a system of water works. The case was one in which the city was attempting to resist the imposition of a tax to pay hydrant rental for water furnished under the contract, upon the ground that

the contract was void because the city had attempted to make it for a period of twenty-one years. The court called attention to the fact that the question, whether the city had attempted to grant an exclusive franchise, was not material to the case before it; that it was not a question between contending water companies as to which should have certain privileges.

Illinois Trust, etc. Bank v. Arkansas City, 76 Fed. Rep., 272, was a suit against the city for water rental, which had accrued under a contract between the city and the water company. The case is certainly not applicable to the one at bar, the court holding that the contract, if void as to its exclusive feature, was, under repeated decisions of the Supreme Court of Kansas, valid notwithstanding it ran for a long term of years. It was not a case between a water works company, asserting an exclusive right to furnish water to the city and its inhabitants, and the city or a rival company denying the right and attempting to engage in a similar business; it was simply a suit to recover hydrant rental, under a contract between the city and the water company, in which the city sought to interpose against liability for rental the defense that the contract was void, first, because it was sought to be made exclusive and, second, because the city had no authority to make a contract to run for the period named. The city was not attempting to establish water works of its own nor to enter into a contract with another person or corporation. The court, in the progress, of the opinion, called attention directly to this fact and held that a city could not, in a suit brought to recover water rental, set up that the contract was *ultra vires* because it contained terms which might be construed as an attempt to make an exclusive contract, or because it ran for a long period of time. The court further said that, whether its view that the contract was not void because running for a long term of years was correct or not, the question was concluded by repeated decisions of the Supreme Court of Kansas holding that municipal corporations of that State could make a contract for the time the city in that instance had sought to bind itself, and that the court was bound by the decisions of the Supreme Court of Kansas determining and declaring the powers, possessed by its municipal corporations.

Judge Sanborn, in delivering the opinion of the court, stated

that, if a grant of a similar privilege, not exclusive, had been subsequently made by the city to another corporation and that corporation had proceeded to construct another system of water works, neither the company nor the city could maintain a bill to enjoin such proceeding, because, being beyond the power of the city to make a grant of an exclusive privilege, that portion of the grant would not sustain a bill to restrain the violation of its terms. He cited Jackson County Horse Ry. Co. v. Interstate Rapid Transit Ry. Co., 24 Fed. Rep., 306, 310; Omaha, etc. Ry. Co. v. Cable Tramway Co., 30 Fed. Rep., 324; Saginaw Gas Light Co. v. City of Saginaw, 28 Fed. Rep., 529; Long v. Duluth, 49 Minn., 280, s. c. 51 N. W., 913.

The cases of New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S., 650; Water Works Co. v. Rivers, 115 U. S., 674; St. Tammany Water Works Co. v. New Orleans Water Works Co., 120 U. S., 644; Louisville Gas Co. v. Citizens Gas Co., 115 U. S., 683-687, and all other cases that have come under observation in which the jurisdiction of the Circuit Court has been sustained on the ground that a Federal question was involved and in which an injunction has been granted, were, as stated, cases where the franchise conferred upon the complainants was exclusive in its character, and made by the State or the municipality having authority to confer it, and in the absence of any constitutional prohibition, or provision, under which the exclusive character of the franchise might be revoked or recalled.

"The generally received doctrine now is that legislative acts, granting franchises to corporations, are to be strictly constructed in accordance with the terms of the grant, and that the grantee takes nothing by implication either as against the State or as against other grantees of similar franchises from the State. In order, therefore, to warrant relief in equity, against an invasion of or infringement upon the franchise, it must appear by the terms of the grant that the plaintiff is entitled to the exclusive enjoyment of the franchise in question; and unless this element of exclusiveness appears in the grant itself it will not be imported by implication. Unless, therefore, the grant of the franchise under which plaintiff claims is exclusive in its terms, equity will not interfere by injunction or restrain the operations of persons claiming the right to exercise a similar franchise under legislative authority.

And since an exclusive franchise can not be implied from a legislative grant, in the absence of express terms whereby it is made exclusive, it follows that a legislature may rightfully create a franchise which will conflict with one previously created, if the first were not, in express terms, exclusive of all others." 2 High on Injunctions, sec. 902 and authorities cited.

S. R. FISHER,
For Appellees.

No. 285 & 44.

Sup'l Brf. of Fisher, for Appellees

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Filed April 22, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 285.

THE PENN MUTUAL LIFE INSURANCE COMPANY ET AL., APPELLANTS,

vs.

THE CITY OF AUSTIN ET AL.

SUPPLEMENTAL BRIEF FOR APPELLEES.

The extracts from the act of 1875 (Gen. Laws Texas, ~~1895~~, 1875, page 126, section 31) and from the Revised Statutes of Texas, 1879 (article 374), cited by appellants at page 77 of their brief, have no application whatever. The statute, carried forward into the Revised Statutes as title XVII, in express terms applies to cities organized and acting under the general law and not to cities, like Austin, chartered by special act of the legislature (see title of act, Gen. Laws, 1875, page 113; also sections 1 and 157 and sections 340 and 341, title XVII, Rev. Stats.

Metzgar *vs.* Borough of Beaver Falls, 178 Pa., 1, S. C., 35

Atl., 1135, simply follows the case of White *vs.* Meadville, and affirms the construction therein placed by the court upon the Pennsylvania statutes relating to the powers of water corporations and the powers of cities of the third class as to water supply.

It is not perceived that the case of National Water Works Co. *vs.* Kansas City, 62 Fed. Rep., 863, has any relevancy here.

Atlantic Water Works Co. *vs.* Atlantic City, 39 N. J. Eq., 367; S. C., 6 Atl. Rep., 24, repeatedly cited and relied upon by appellees, seems to have been overruled in Atlantic City Water Works Co., 44 N. J. Eq., 427. At any rate, the court ruled that the decision made by the court in that case was wrong, and that the court had evidently overlooked certain provisions of the New Jersey constitution prohibiting the conferring of an exclusive privilege to furnish water.

S. R. Fisher,
Counsel for Appellees.

PENN MUTUAL LIFE INSURANCE CO. *v.* AUSTIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 44. Argued April 23, 1897. — Decided January 3, 1898.

The complainants in their bill predicated their right to relief upon the averment that certain ordinances adopted by the municipal authorities of Austin, and an act of the legislature of Texas referred to in their bill impaired the obligations of a contract which the bill alleged had been entered into with the complainants by the city of Austin, and that both the law of the State and the city ordinances were in contravention of the Constitution of the United States. *Held*, that these allegations plainly brought the case within the provision in the act of March 3, 1891, c. 517, 26 Stat. 826, conferring upon this court jurisdiction to review by direct appeal any final judgment rendered by a Circuit Court in any case in which the constitution or a law of a State is claimed to be in contravention of the Constitution of the United States.

The reason upon which the rule that the mere assertion of a claim, unaccompanied by any act to give effect to the asserted right, cannot avail to keep alive a right which would otherwise be precluded because of laches, is based not alone upon the lapse of time during which the neglect to

Statement of the Case.

enforce the right has existed, but upon the change of condition which may have arisen during the period in which there has been neglect; and when a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect.

The facts in this case bring it within that rule.

THE court below sustained a demurrer to and dismissed for want of equity the bill of the complainants, by which, as citizens of the States of Pennsylvania, Maryland and New York, respectively, they impleaded the defendants, the one a municipal corporation created by a law of the State of Texas, and its Mayor and Board of Public Works, citizens of the State of Texas, and the other a corporation organized under the authority of the general laws of the State of Texas regulating the formation of corporations, also a citizen of that State.

The bill, which was filed on January 3, 1895, alleged in substance as follows: That the city of Austin was in 1892 a municipal corporation, and that for many years its inhabitants and the city itself for municipal purposes had been supplied with water by a corporation known as the City Water Company; that in 1882, in consequence of the growth of the city, both for the health of the people of the city, the safety of its property, and the development of its manufacturing industries, a larger supply of water was absolutely needed, and that the taxpayers presented a petition to the city authorities asking that an arrangement by contract or otherwise be at once made to afford the augmented water supply which was essential; that the municipality, being fully empowered by its charter to supply water and being authorized by the general laws of the State of Texas to make a contract for so doing, on the 13th day of April, 1882, did enter into a contract with the City Water Company to the end that a more copious supply of water should be furnished; that this contract gave to the company the right to furnish water for twenty years, with the privilege on the part of the city of buying at the end of ten years, or at any time on giving one year's notice, the

water works which the contract required the company to erect; that the contract fixed a reasonable price to be paid for the use of water to be furnished by the water company, provided for the establishment of a given number of hydrants for the use of the city, and stipulated a rental therefor; that it imposed upon the corporation obligations of the most onerous character, compelling it to erect a large and costly plant, to lay extensive mains and pipes, and to extend them at any time during the life of the contract wherever the city might direct, and exacted that the company should add new hydrants for municipal uses as the city might require, giving to the water company as compensation in addition to the rentals to be paid by the city for hydrants, as above stated, a commutation of municipal taxation.

The bill averred that the contract was in all respects advantageous to the city and beneficial to its inhabitants, and was indeed as to each and every obligation contained therein or resulting therefrom reasonable and just; that the city at the time the contract was entered into was not in a position to itself erect the works without inordinately increasing its burden of taxation, and that the contract contemplated that the water company should obtain the money to erect the works by issuing its negotiable bonds, since there was therein contained a stipulation that the money to become due for the rentals of the hydrants should be paid by the city to the trustee of any bonds which might be issued by the water company, so as to guarantee the prompt payment of the interest on any such bonds; that the water company, on the faith of the contract, issued to the Farmers' Loan and Trust Company its negotiable bonds for $250,000, secured them by mortgage upon all its property, present and prospective, and with the sum thus realized and other available resources, with integrity and fidelity and in complete compliance with every obligation resting on it, erected the desired water works plant, which afforded the desired supply of water; that of the bonds thus issued to the Farmers' Loan and Trust Company, $100,000 in amount were bought for more than their face value in open market by the Penn Mutual Life Insurance Company, one of

the complainants. The bill moreover alleged that, in March, 1883, after the plant had been constructed and many miles of mains had been laid, the city, by ordinance duly enacted, accepted the work, and declared that the water company had fully performed its obligations. That subsequent to this date, the city directed a very large extension of the mains and pipes to be made, which was promptly executed by the water company with money obtained from an additional issue of bonds to the Farmers' Loan and Trust Company amounting to $100,000, $10,000 of which Jacob Tome, another of the complainants, bought for full value in open market.

The bill then alleged that in 1884 the city of Austin contracted with a corporation known as the Austin Electric Light Company to build and carry on a plant required to light that city, and that this corporation issued its bonds to carry out its corporate purposes to the extent of $25,000. That in June, 1887, all the plant rights, privileges, franchises and obligations of this electric light company, as well as those of the water company, were, with the consent and approval of the city of Austin, transferred to a corporation known as the Austin Water, Light and Power Company, a Texas corporation having corporate capacity both to undertake the duty of supplying water and of furnishing light to the city of Austin; that, in consequence of its assumption of all the obligations of both the aforementioned companies, the Austin Water, Light and Power Company was required by the city to make considerable additions to its water mains, and, in order to obtain the capital to execute these directions of the city, that company issued to the Farmers' Loan and Trust Company of New York $750,000 of bonds, secured by mortgage upon all its property, $375,000 of these bonds being reserved to pay the outstanding bonds, (that is, the $250,000 first issue of the water company, the $100,000 second issue and the $25,000 issue by the Austin Electric Light Company,) and the remaining $375,000 being negotiated in open market for full value, the proceeds being expended in complying with the city's direction, and that $50,000 of these last bonds were purchased in open market for full value by Ogden and Robert Goelet,

the last named complainants. The bill averred that the water works thus originally established and extended were in every respect entirely adequate to supply every want, not only of all the inhabitants of the city of Austin, but of the municipality, and that in each and every particular the municipality was as advantageously placed with respect to a water supply as it could have been under any condition or circumstance whatever.

The bill then alleged that, despite the existence of the contract, and the entire justness and fairness of each and every obligation and stipulation therein contained, and without any just reason therefor, the city of Austin, on the 31st day of March, 1890, passed an ordinance entitled "An ordinance ordering an election to obtain the consent of the property tax paying qualified voters of the city of Austin, to the extension by the city council of the bonded indebtedness of the city of Austin for the purposes of constructing a system of water works and furnishing lights for the city of Austin." That this ordinance provided that an election should be held on the 5th day of May, 1890, to obtain the consent of the taxpayers for an increase of the bonded indebtedness of the city to the amount of $1,400,000 for the purpose of obtaining money to erect a system of water works and an electric light plant for lighting the city; that on the 5th of May, 1890, the election was held, as provided, and the taxpayers gave their assent to the proposition submitted by the ordinance, and that the city council thereafter declared the election to have been carried, and that the power to issue bonds had been sanctioned; that on July 21, 1890, the city passed an ordinance authorizing the increased issue of $1,400,000 of bonds, providing for the levy and collection each year, as long as the bonds should be outstanding, of a tax to aid in paying the same. This ordinance directed that the bonds on their face should not only contain a statement of the objects for which they were issued, but should also show that their payment was secured by all the sums to be collected for the use of the water to be furnished by the new plant, and the ordinance moreover contained a provision guaranteeing that the rates to be charged for the

water to be furnished should be so regulated that their product would equal the sum of the interest on the bonds, and a sinking fund to provide for the retirement of the principal thereof. The money to be realized from the sale of the bonds was required to be set apart in a distinct fund, to be warranted for from time to time in payment of the work as it progressed. The character of the work to be done was moreover fixed by an ordinance which empowered the board of public works to construct water works by means of a dam across the Colorado River at a designated point, in accordance with the plans of a civil engineer who was named therein.

It was alleged that as the purpose and necessary effect of the foregoing action of the city was to impair the contract rights of the Austin Water, Light and Power Company held by it as the assignee of the two original companies, the ordinances passed by the city and each and everything subsequently done thereunder was void because repugnant to the Constitution of the United States. The bill moreover averred that in April, 1891, the legislature of the State of Texas passed an act giving a new charter to the city of Austin, which contained an express grant of power to that city to construct for its own use a water works plant, and that the sole object of this new charter was to sanction the action of the municipality previously taken, and therefore the act in question was also void under the Constitution of the United States, because it impaired the previous contract rights of the Austin Water, Light and Power Company.

It was averred that the board of public works had "already expended a large sum of money in the construction of a dam across the Colorado River," and "are now actually laying water pipe in and along the streets of the city of Austin, and it is the avowed intention of the said city to press the construction of said rival system of water works to a speedy completion, and upon the completion of the same to discontinue the taking of water from the said water company, and to refuse to perform any obligation resting upon the said city as embraced in the said contract with the said city water company." It was alleged that the tax provided by the ordinance

which authorized the building of the new water works had been levied for the years 1893 and 1894, and that the property of the Austin Water, Light and Power Company had been assessed for this tax, and that the property of the company was thus being levied upon for a tax to be used for the purpose of erecting the new works which were intended to take the place of its plant, and thereby to destroy its contract rights. Although the bill was filed by the complainants in virtue of their rights as holders and owners of the bonds issued or assumed by the Austin Water, Light and Power Company as aforesaid, it contained no averment that either the bondholders, who were complainants, or any others, had at any previous time requested the trustee to take any action so as to prevent the accomplishment of the violation of the contract rights of the corporation and its bondholders, which it was alleged had inevitably arisen from the action of the city originating in 1890. The bill, however, contained the following averments:

"That as soon as the said city of Austin announced its intention of constructing a rival system of water works, and before anything was done in pursuance thereof, the said M. D. Mathers, president of the Austin Water, Light and Power Company, on behalf of the said water company and these bondholders, remonstrated with the said mayor and city council, and requested them and urged them not to violate the said contract, or to take any steps to depreciate the value of the property of the said water company, but to exercise the right which the said city has to purchase the said works at their appraised value; and the said bondholders have continued, ever since that time, to remonstrate with the said city of Austin and the officers thereof, but that the said city has entirely disregarded the said remonstrances and requests, and has openly repudiated all liability under the said contract."

And further the bill alleged:

"That your orators and the other bondholders of the said water company have repeatedly applied to the said Austin Water, Light and Power Company, and its president and board of directors, and requested them to institute proceedings

to protect the property of the said water company, and the rights therein of the said bondholders; but that the said water company has failed to comply with the request of your orators and said bondholders. But the said Austin Water, Light and Power Company, and the officers thereof, by reason of the contract relations existing between the said city of Austin and the said company, fear that the consequences of any such litigation instituted by the said Water Company, would be exceedingly disastrous and would precipitate adverse and hostile action by the said city of Austin."

The relief asked by the bill is thus stated in the prayer thereof:

"That your orators may have the decree of your honorable court, adjudging and decreeing that the said ordinance and contract, so accepted and acted upon by all the parties, are in full force and effect, and that the said contract is a valid and subsisting contract, binding upon the said city as well as upon the said water company and upon the said bondholders, and that the said city must abide by and perform the same, and that until its purchase of the said existing water works, in the manner and upon the terms set forth in the said contract, and that the said city of Austin, its mayor and city council and board of public works, have no right or power to construct a river water works system to, in any way, interfere with the rights of the said Austin Water, Light and Power Company, and that it is unlawful and inequitable for the said city of Austin to levy and collect the tax upon the property of the said Austin Water, Light and Power Company to be expended in the unlawful and inequitable manner hereinbefore alleged, in the construction of a rival system of water works; and that a writ of injunction may issue out of this honorable court restraining the said city of Austin, its mayor and city council and board of public works, and its other officers, servants, agents and employés, from taking a supply of water from any other source and from proceeding in constructing and maintaining a new and distinct system of water works, and from taking and appropriating to its own use, except in the manner provided in said contract, any portion of the

said works, so constructed at its instance and for its benefit with money furnished upon the faith of its obligation by the said Austin Water, Light and Power Company and the said bondholders, and that your orators may have such other and further relief as the case may, in equity, require and as to this honorable court may seem proper."

The demurrer which the lower court sustained, besides asserting that the bill disclosed no cause for equitable relief, rested upon seven grounds, which may be reduced to six, substantially as follows: 1st. Because by the constitution of the State of Texas the contract made by the city of Austin with the water company was void. 2d. Because the contract was beyond the power of the corporation as defined in its charter and as limited by the general laws of the State of Texas. 3d. Because the commutation of taxation granted to the water company was in its essence but an exemption, and the city was without power, under the constitution of the State of Texas, to grant it. 4th. Because even if an exclusive right was given to the water company, such grant under the constitution and laws of the State of Texas was subject to alteration, amendment or repeal by the legislature which had exercised such reserved power. 5th. Because the granting of any exclusive rights was forbidden by the constitution which was in force at the time the alleged contract was made. 6th. Because even if the complainants had any contract rights, and if there had been an impairment thereof, full and adequate remedy was afforded by an action at law, and there was, hence, no reason for the interposition of a court of equity.

Mr. Skipwith Wilmer and *Mr. D. T. Watson* for appellants. *Mr. Samuel B. Huey* was on their brief.

Mr. S. R. Fisher for appellees.

Mr. Justice White, after making the foregoing statement of the case, delivered the opinion of the court.

The jurisdiction of this court to review the decree of the trial court is denied, the contention being that if an appeal

from the decision of the trial court was desired, it should have been had in the Circuit Court of Appeals, and cannot be here obtained.

By the fifth section of the act of March 3, 1891, c. 517, 26 Stat. 826, creating the Circuit Courts of Appeals, jurisdiction is conferred upon this court to review by direct appeal any final judgment rendered by the Circuit Court "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." There can be no doubt that the case at bar comes within this provision. The complainants in their bill in express terms predicated their right to the relief sought upon the averment that certain ordinances adopted by the municipal authorities of the city of Austin, and an act of the legislature of the State of Texas referred to in the bill, impaired the obligations of the contract which the bill alleged had been entered into with the complainants by the city of Austin, and that both the law of the State of Texas and the city ordinances were in contravention of the Constitution of the United States. No language could more plainly bring a case within the letter of a statute than do these allegations of the bill bring this case within the law of 1891.

Not only were the averments of the bill, as to the invalidity of the state law adequate, but so also were the allegations as to the nullity of the city ordinances. These ordinances were but the exercise by the city of a legislative power which it assumed had been delegated to it by the State, and were, therefore, in legal intendment the equivalent of laws enacted by the State itself. *City Railway Co.* v. *Citizens' Street Railroad Co.*, 166 U. S. 557, and cases there cited. The argument by which it is sought to support the contention that a right to review the case by direct appeal does not exist, not only disregards the letter of the statute, but is unsound in reason. It says that the right to the direct appeal can alone rest on the proposition, "That the constitution or a law of the State of Texas conflicts with appellant's contract, and contravenes the Federal Constitution; in other words, it must affirmatively appear upon the face of complainant's bill

that there was involved in this case a Federal question, the determination of which was essential to a correct decision of the case." But the words of the statute, which empower this court to review directly the action of the Circuit Court, are that such power shall exist wherever it is claimed on the record that a law of a State is in contravention of the Federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is, not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case. The authorities referred to as supporting the position indicate that the argument is the result of a confusion of thought, and that it arises from confounding the power of this court to review on a writ of error the action of a state court with the power exercised by this court, under the act of 1891, to review by direct appeal the final action of the Circuit Court where, on the face of the record, it appears that the claim was made that the statute of a State contravened the Constitution of the United States. These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record. *Horner* v. *United States*, 143 U. S. 570.

Conceding, without deciding, the legality and binding force of the contract as averred in the bill, and that the obligations which it created were materially impaired, not only by a law of the State of Texas, but also by the ordinances passed by the city, and the execution of such ordinances, all as alleged; conceding, moreover, without so deciding, that the Austin Water, Light and Power Company was the successor in law of the original corporations, and hence responsible for all

their obligations and entitled to all their rights; and, further, conceding that the complainants as bondholders have the capacity to assert the impairment of the contract made by the city of Austin with the City Water Company, it yet becomes at the outset necessary to decide whether granting, *arguendo*, all these propositions, the complainants are entitled to the relief which they seek, that is to say, whether they can be heard to invoke the interposition of a court of equity. As a prerequisite to the solution of this question, it is necessary to determine precisely the remedy which it is the purpose of the bill to obtain in order to redress the wrongs which it alleged to exist. Whilst the prayer of the bill asks that the validity of the contract be recognized, and whilst it also prays that the legality of the commutation of taxation created by the city ordinance be decreed, these prayers are made but the foundation or premise for the real relief which the bill invokes; that is, the exercise of the power to enjoin in order thereby to perpetually restrain the city of Austin from completing the water works, by it commenced, and from levying on the property of the Austin Water, Light and Power Company any taxation to be used to complete the new water works. The preliminary inquiry, therefore, is whether the complainants have so exercised their rights as to entitle them to prevent the city from completing the water works.

In *Speidel* v. *Henrici*, 120 U. S. 377, 387, the court said, speaking through Mr. Justice Gray:

"Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court.'"

In *Galliher* v. *Cadwell*, 145 U. S. 368, 371, speaking through Mr. Justice Brewer, it was said:

"The question of laches turns not simply upon the number of years which have elasped between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during the lapse of years. The cases are many in which this defence has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all."

In *Hammond* v. *Hopkins*, 143 U. S. 224, 250, through Mr. Chief Justice Fuller, the court said:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred."

In *Willard* v. *Woods*, 164 U. S. 502, 524, the court said:

"But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded or the bill demurred to. *Sullivan* v. *Portland & Kennebec Railroad*, 94 U. S. 806, 811; *Lansdale* v. *Smith*, 106 U. S. 391, 394; *Badger* v. *Badger*, 2 Wall. 87, 95."

In *Lane & Bodley Co.* v. *Locke*, 150 U. S. 193, and *Mackall* v. *Cassilear*, 137 U. S. 556, it was held that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches. Indeed, the principle by which a court of equity declines to exert its powers to relieve one who has been guilty of laches as expressed in the foregoing decisions has been applied by this court in so many cases besides those above referred to as to render the doctrine elementary. *Whitney* v. *Fox*, 166 U. S.

637, 647, 648; *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573, 582; *Abraham* v. *Ordway*, 158 U. S. 416, 423; *Ware* v. *Galveston City Co.*, 146 U. S. 102, 116; *Foster* v. *Mansfield, Cold Water etc. Railroad*, 146 U. S. 88, 102; *Galliher* v. *Cadwell*, *supra*, where the earlier cases are fully reviewed; *Hoyt* v. *Latham*, 143 U. S. 553; *Hanner* v. *Moulton*, 138 U. S. 486, 495; *Richards* v. *Mackall*, 124 U. S. 183, 189.

The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect. The adjudicated cases, as said in *Galliher* v. *Cadwell*, *supra*, 372, "proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them." The requirement of diligence, and the loss of the right to invoke the arm of a court of equity in case of laches, is particularly applicable where the subject-matter of the controversy is a public work. In a case of this nature, where a public expenditure has been made, or a public work undertaken, and where one, having full opportunity to prevent its accomplishment, has stood by and seen the public work proceed, a court of equity will more readily consider laches. The equitable doctrine in this regard is somewhat analogous to the legal rule which holds that where one who has the title in fee to real estate, although he has not been compensated, "remains inactive and permits them (a railway company) to go on and expend large sums in the work, he will be

estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein and be restricted to a suit for damages." *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 11, and authorities there cited. As said in *Galliher* v. *Cadwell*, *supra*, 373: "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced — an inequity founded upon some change in the condition or relations of the property or the parties."

Do the facts in the case before us bring it within the rule of laches as expounded in the foregoing authorities? The rights of the water company, under its contract, were created long prior to the year 1890. Before that year the water works plant was constructed, and from it the inhabitants of the city of Austin were being supplied with water. The violation of the contract relied upon as impairing its obligations originated in 1890. The first step was the passage of an ordinance submitting to the voters of the city of Austin the proposition whether the bonded debt of the municipality should be increased by the issue of $1,400,000 of negotiable bonds, the proceeds arising from the sale of such bonds to be used in erecting the new water works. There was nothing clandestine in the conduct of the municipality, since its action was dependent on a municipal election. The holding of the municipal election followed, and, after it had taken place, occurred the passage of the ordinance, directing the issue of the new bonds, and providing that they were to be secured by the water rates to be collected from the new water works which were to be constructed. From the time of the submission to the vote, and of the ordinances issuing the bonds and directing the work to be done, all in 1890, until this bill was filed in 1895, no legal steps whatever appear by the bill to have been taken to prevent the consummation of the wrong which the bill alleges was necessarily to result from the action of the municipal authorities. During all this period it does not appear from the bill that the trustee representing the bond-

holders was ever called upon by them to take any steps whatever to protect their interest. It cannot be said that the bondholders were ignorant of the action and purposes of the city of Austin, since the bill avers that, conscious of the fact that their rights were to be impaired by the action of the city, they repeatedly called upon the Austin Water, Light and Power Company to take action on the subject, but that that corporation refused so to do, and that the bondholders continued to object to the proposed action of the city without doing anything whatever to protect their legal rights. The bill alleges the issue by the municipal authorities of the series of bonds provided for, since it says, in referring to the tax levied upon the property of the Austin Water, Light and Power Company, that for the purpose "of providing for the interest and sinking fund on the bonds of the said city of Austin, issued for said purpose," (that is, the new water works,) "the said city of Austin has levied a tax. . . ." The exact amount of the new bonds which have been issued is not specifically set out in the bill, but it is inferable from the allegations, to which we have just referred, that the whole series have been issued by the city, since the bill alleges that the taxation has been levied for the purpose of paying the bonds provided by the ordinance. Moreover, that either the whole or a large portion of the bonds have been issued is plainly deducible from other averments in the bill. The ordinance, which is an exhibit to the bill, provides that to pay for the work proposed the bonds should be discounted from time to time as required by the necessities of the situation, that the proceeds arising from their sale should be put to a special fund, and be warranted against by the proper city officer to pay for the work. And the bill avers that the city at great expense has nearly completed a costly dam across the Colorado River as a part of the work provided. The bill therefore presents a case where there has arisen during the existence of the delay a material change in the situation of the parties, and besides is one where rights of third parties have intervened. It cannot be said, under the case made by the bill, that the power of a court of equity can be exerted to

forbid the finishing of the water works structure, which the bill alleges has been largely completed, without seriously impairing the rights of the bondholders under the ordinances in question. One of the methods of payment stipulated, as we have seen, for these bonds was the revenue to be derived from the new water works, and of course no such revenues can ever result if the water works are never to be finished. It is certain, then, that if the completion of the new water works be restrained by an injunction, that the interest of the new bondholders will be seriously affected, and that this result will be brought about by a decree of a court of equity rendered in the enforcement of asserted rights of complainants, who, if they had taken timely action, could have adequately protected themselves from injury without resulting wrong to the rights of many other persons.

It being clear under such circumstances that the complainants were not entitled to the relief which they sought, it of course follows that

The court below did not err in sustaining the demurrer and dismissing the bill for want of equity. We think, however, that the dismissal should have been without prejudice, and the decree below is therefore modified in that particular, and as so modified, it is affirmed.